TRANSCRIPT OF RECORD

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 663

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

INDEX

	Original	Print
Record from District Court of the U. S., District of New Jersey	2	1
Order to show cause	2	1
Petition	4	2
Exhibit A—Report and order of Interstate Commerce Commission Nov. 2, 1928	14	7
Exhibit B—Report and order of Interstate Commerce Commission May 7, 1927	26	14
Intervention of Interstate Commerce Commission	38	21
Answer of Interstate Commerce Commission	39	22
Answer of United States	44	24
Opinion	48	26
Final decree	54	30
Petition for appeal	56	31
Order allowing appeal	57	31
Notices of appeal	59	32
Assignments of error	63	33
Praecipe for transcript of record	65	34
Stipulation re transcript of record	67	35
Proceedings before Interstate Commerce Commission	69	36
Narrative statement of evidence	69	36
Testimony of Jacob D. Goldberg	69	36
Lewis H. Rubin	71	38
C. L. Chapman	72	38
C. D. Ward	72	39
Jacob D. Goldberg	73	39
J. S. Tucker	83	45
Lewis H. Rubin	87	48
George H. Hobbs	88	48
O. M. Meyne	96	53

	Original	Print
Record from District Court of the U. S., District of New Jersey—Con.		
Narrative statement of evidence—Continued.		
Testimony of Jacob D. Goldberg—Continued.		
Complainants' Exhibits 2 and 3—Comparisons of rates and earnings on wood pulp shipments	99	55
Complainants' Exhibit 15—Bill of lading	101	56
Exhibit No. 36—Statement covering movement of wood pulp, etc	103	62
Exhibits—Contracts for wood pulp	104	63
Secretary's certificate	108	68
Complaint	110	69
Motion for leave to amend complaint	113	71
Order amending complaint	115	72
Answer of Reading Co. [omitted in printing]	116	72
Answer of Central Railroad of New Jersey [omitted in printing]	117	72
Answer of Erie Railroad Co	120	72
Answer of Baltimore & Ohio Railroad Co. [omitted in printing]	121	73
Order postponing order of May 7, 1927	122	73
Order reopening case	123	73
Affidavit of David L. Gray	124	73
Citation and service [omitted in printing]	126	75
Clerk's certificate [omitted in printing]	128	75
Docket entries	129	75
Statement of points to be relied upon and designation of parts of record to be printed	130	75

[File indorsement omitted.]

In United States District Court, District of New Jersey

ERIE RAILROAD COMPANY ET AL., PETITIONERS
AGAINST
THE UNITED STATES OF AMERICA, RESPONDENT

In equity

Order to show cause

Filed Dec. 17, 1928

Whereas, in the above-entitled suit application has been made to the undersigned, a district judge of the United States for the District of New Jersey, for an interlocutory injunction suspending and restraining enforcement, operation, and execution of and setting aside a certain order made by the Interstate Commerce Commission as of the date of November 2, 1928, and

Whereas, a verified petition praying for such interlocutory injunction and for a permanent injunction forever enjoining, setting aside, annulling, and suspending the enforcement, operation, and execution of said order of the Interstate Commerce Commission as set forth in said petition has been duly filed with the clerk of this court, and

Whereas, it has been made to appear from said verified petition that the petitioner may be entitled to an interlocutory injunction suspending and restraining the enforcement, operation and execution of and setting aside said order of the Interstate
3 Commerce Commission as set forth in said petition, it is

Ordered that the respondent herein, the United States of America, appear before the undersigned and two other judges, at least one of whom being a United States circuit judge, said judges having been called by the undersigned to his assistance to hear and determine said petition in accordance with the provisions of an act of Congress of October 22, 1913, at the post office building, Trenton, N. J., December 19th, 1928, at ten thirty (10.30) o'clock in the forenoon, or as soon thereafter as counsel can be heard, and then and there show cause before said court and judges so convoked or so called together why the interlocutory injunction prayed for in said petition should not issue, and it is further

Ordered that a copy of this order with the petition attached thereto be served upon the Attorney General of the United States and on the secretary or chief counsel of the Interstate Commerce Commission, and that notice of this hearing be served upon them at least five days before said December 19th, 1928, as by said statute made and provided.

J. L. BODINE,
United States District Judge.

Dated at Newark, N. J., this 17th day of December, 1928.

4 In United States District Court

[Title omitted.]

Petition

(Filed Dec. 17, 1928)

Your petitioners, more fully described hereinafter, bring this petition against the United States of America and hereby sue to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission, a commission existing by virtue of an act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, and thereupon your petitioners complain and say:

I

Your petitioners are the following-named corporations:

Erie Railroad Company, a corporation organized and existing under the laws of the State of New York, with its principal office at 50 Church Street in the borough of Manhattan, city, county and State of New York, and Hoboken Manufacturers' Railroad Company, a corporation organized and existing under the laws of
5 the State of New Jersey, with its principal office at Jersey City, in New Jersey.

Both of your petitioners are common carriers engaged in the transportation of freight by railroad in interstate and intrastate commerce subject to the provisions of the interstate commerce act and the provisions of the laws of the several States through which they operate, in so far as the same are constitutional and applicable. As such common carriers, your petitioners are engaged in the transportation of wood pulp from New York City, N. Y., in interstate commerce to Garfield, N. J., and from Hoboken, N. J., to Garfield, N. J., in intrastate commerce.

II

This suit is brought to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission and is instituted under the provisions of the interstate commerce act and of an act of Congress of October 22, 1913, entitled "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913, and for other purposes" (38 Stat. L. 208, 219), and also under the general equity jurisdiction of this court.

III

The order of the Interstate Commerce Commission which it is hereby sought to enjoin, set aside, suspend, and annul was made upon the petition of the Hamersley Manufacturing Co., a corporation existing under the laws of the State of New Jersey, whose principal

office and residence is located at Garfield, in Bergen County, in the State of New Jersey, and in the judicial district of the United States District Court for New Jersey.

6

IV

The said order of the Interstate Commerce Commission which it is hereby sought to enjoin, set aside, suspend, and annul was made on the 2nd day of November, 1928, in a proceeding entitled "The Hamersley Manufacturing Company v. Erie Railroad Company et al., I. C. C. Docket No. 16531." The report of the Interstate Commerce Commission in the proceeding referred to also embraced a proceeding entitled "Clifton Paper Mills v. New York, Susquehanna & Western Railroad Company et al., I. C. C. Docket No. 17326," but the said order is applicable to traffic and transportation involved in the first above entitled proceeding. A copy of said order of the Interstate Commerce Commission, together with a copy of its report upon which said order purports to be based, is attached hereto, marked "Exhibit A," and made a part hereof. Also attached hereto is a copy of an order of the Interstate Commerce Commission, dated May 7, 1927, together with a copy of its report upon which said last mentioned order is purposed to be based, 126 I. C. C. 491, marked "Exhibit B," and which is made a part hereof.

V

The said order of the Interstate Commerce Commission purports to require your petitioners to establish, maintain and apply to the transportation of wood pulp in carloads, which at some prior time had been imported into this country, from Hoboken, N. J., to Garfield, N. J., the freight rate therein specified in lieu of the freight rate now charged and lawfully in effect. The said freight rate so prescribed by the Interstate Commerce Commission is substantially lower than the present freight rate for the transportation of wood pulp from Hoboken, N. J., to Garfield, N. J. The said order requires the said reduced rates to be established and to become effective on or before January 10, 1929, upon not less than five days' notice to the commission and to the public.

7

VI

Your petitioners believe and allege that the said order of the Interstate Commerce Commission is null and void and that it should be enjoined, set aside, suspended, and annulled for the reasons, as more fully set forth hereinafter, that—

A. Said order, and the findings of the Interstate Commerce Commission upon which it purports to be based, are contrary to the evidence and without support of any substantial evidence properly before the Interstate Commerce Commission in the proceeding in which they were made.

B. Said order is made applicable to traffic and transportation over which the Interstate Commerce Commission has no jurisdiction and said order is not an order which the commission is empowered to make by the provisions of the interstate commerce act or by the provisions of any other statute.

C. The enforcement of said order will deprive your petitioners of their property without due process of law in violation of the fifth amendment to the Constitution of the United States.

VII

If your petitioners fail to comply with said order of the Interstate Commerce Commission, they may be subject to prosecution and incur liability for penalties in the amount of $5,000 each per day, as
8 against which liability your petitioners will not have adequate protection at law. On the other hand, if your petitioners, in order to avoid said liability for penalties, under duress, publish and establish the rate specified in the said order of the commission, they will be required to collect that rate and none other. The substitution of said rate specified in the commission's said order for the rate now in effect will result in substantial reductions in revenues of your petitioners, and if later it shall finally be determined that said order of the Interstate Commerce Commission was and is null and void your petitioners will be without any means of collecting the difference between the said rate prescribed by the commission and their present rate, if pending such final determination the said order of the commission is permitted to become effective and your petitioners are required to publish and establish the rate therein specified. Your petitioners are informed and believe that since the hearing before the Interstate Commerce Commission in this proceeding there has been a further movement of said traffic in the manner disclosed in the evidence in this case from Hoboken, N. J., to Garfield, N. J., and that there will continue to be such movement in substantial volume. Therefore, if said order of the Interstate Commerce Commission is not enjoined, set aside, suspended, and annulled, and if, pending final determination herein, its enforcement is not temporarily enjoined and suspended, your petitioners will suffer irreparable injury for which they will be without adequate remedy or protection at law.

VIII

On December 4, 1924, there was filed with the Interstate Commerce Commission the complaint of the Hamersley Manufacturing
9 Company v. Erie Railroad Company, Hoboken Manufacturers' Railroad Company, and others. This complaint alleged, among other things, that a carload rate of 11.5 cents per 100 pounds, since increased to 12.5 cents, assessed and collected by your petitioners on imported wood pup, in rolls and bales, from Hoboken, N. J., to Garfield, N. J., had been and was unjust and unreasonable. It

prayed that the commission prescribe lower rates for the future and award reparation on shipments which moved subsequent to January, 1923, and during the pendency of the proceeding. The Interstate Commerce Commission issued its report and order under date of May 7, 1927 (Exhibit B), in which it found that the rate assailed from Hoboken, N. J., to Garfield, N. J., had been, was, and would be unreasonable to the extent that it exceeded 10.5 cents, and awarded reparation as damages on the traffic covered by the complaint.

IX

Your petitioners, in their further investigation to ascertain the amount of reparation, developed facts which in their judgment showed that while the wood pulp had been physically imported, the traffic and transportation presented for the consideration of the Interstate Commerce Commission was intrastate and hence not subject to the jurisdiction of that commission. Thereupon they petitioned for a rehearing upon that question. The complainant before the commission also petitioned for a rehearing upon other issues and the Interstate Commerce Commission reopened the proceeding for further hearing, which was duly had at New York City, N. Y., on November 8, 1927. Thereafter, and on November 2, 1928, the commissioner handed down its report and order on further hearing (Exhibit A), in which it found and held that the shipments in
10 question were subject to its jurisdiction; that the rate assessed thereon by your petitioners had been, was, and for the future would be unreasonable to the extent that it exceeded 10 cents per 100 pounds and awarded reparation, as damages, in the amount represented by the difference between the charges as assessed at the rate of 11.5 cents and later 12.5 cents per 100 pounds and what such charges would have been if assessed at the rate of 10 cents per 100 pounds. Your petitioners were, by said order of November 2, 1928 (Exhibit A), notified and required to establish on or before January 10, 1929, upon not less than five days' notice to the Interstate Commerce Commission and to the general public, and thereafter to maintain and apply to the transportation of the wood pulp under consideration in the proceeding, from Hoboken, N. J., to Garfield, N. J., "a rate which shall not exceed 10 cents per 100 pounds."

X

In its report, Exhibit A, the commission states:

"The record convinces us that the broker acts only as an agent, and that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield, N. J., and therefore that the traffic is of the character over which we have jurisdiction."

The said finding is contrary to the evidence of record. The record shows that the party stated by the commission to be a broker was not an agent in the matter of the purchase and sale of the wood pulp in

question but was a principal and stood in the position of vendor thereof. The record further shows that not until after the arrival of the wood pulp at Hoboken, N. J., and the payment of its purchase price by the Hamersley Manufacturing Co., and its delivery
11 on the steamship pier, was any specific bale or roll set aside to be shipped from Hoboken, N. J., to Garfield, N. J., to the Hamersley Manufacturing Co. The record still further shows that the wood pulp shipped over the lines of your petitioners from Hoboken, N. J., to Garfield, N. J., was not consigned to the Hamersley Manufacturing Co., when shipped from the foreign port, but was included in larger quantities, some of which were sold, distributed and delivered to others than the Hamersley Manufacturing Co., and that this wood pulp so shipped from Hoboken, N. J., to Garfield, N. J., was not distinguished in any manner from other wood pulp of the same quality, consigned to the same receiver, but all such wood pulp of the same quality, no matter to whom it was eventually sold by the party described in the commission's report as a "broker" bore the same marks of identification.

XI

In its report, Exhibit A, sheet 2, the commission further states: "The time of passing title to complainant is immaterial so far as the character of the transportation is concerned."

The said finding is erroneous as a matter of law because the status of the title to the property is one of the facts to be given consideration in determining the character of the transportation.

XII

While the commission's report, Exhibit A, recites certain facts of record with respect to the circumstances surrounding the traffic and transportation involved, it entirely omits to recite other facts established by uncontradicted evidence which, if properly found and considered by it, with other facts of record would have neces-
12 sarily led to the conclusion that, as a matter of law, the commission was without jurisdiction over the traffic and transportation here involved, and that the order which is based upon and includes the report itself, is unlawful.

XIII

Inasmuch as your petitioners are remediless in the premises and by the strict rules of the common law, and if the enforcement of the said order of the commission of November 2, 1928, is not stayed and enjoined, will suffer irreparable damage, and to the end that they may attain the relief to which they are entitled, your petitioners pray:

First, upon five days' notice to the Interstate Commerce Commission and the Attorney General of the United States, as provided in

the statutes aforesaid, a hearing before three judges of this court, and after such hearing an interlocutory injunction suspending and restraining the enforcement, operation and execution of, and setting aside in whole or in part, said order of the Interstate Commerce Commission of November 2, 1928.

Second, a permanent injunction decreeing that said order of the commission of November 2, 1928, be declared null and void and be set aside, annulled and suspended, and its enforcement, execution, and operation be forever enjoined.

Third, such other and further relief as may be proper in the premises.

Respectfully submitted.

HERBERT A. TAYLOR,
MARION B. PIERCE,
50 Church St., New York City, N. Y.,
GEORGE S. HOBART,
24 Branford Place, Newark, N. J.,
Solicitors for Petitioners.

13 [*Duly sworn to by Marion B. Pierce; jurat omitted in printing.*]

14 *Exhibit A to petition*

Interstate Commerce Commission

No. 16531 [1]

HAMERSLEY MANUFACTURING COMPANY

v.

ERIE RAILROAD COMPANY ET AL.

Submitted June 6, 1928. Decided November 2, 1928

Upon further hearing found:

1. Shipments of imported wood pulp, in carloads, from Hoboken, to Garfield, N. J., subject to our jurisdiction.

2. Rate on imported wood pulp, in carloads, from Hoboken to Garfield to be unreasonable. Reasonable rate prescribed for the future and reparation awarded.

3. Rate on imported wood pulp, in carloads, from New York, N. Y., to Garfield and Passaic-Dundee, N. J., to be unreasonable prior to October 11, 1927, but not thereafter. Reparation awarded.

Original report, 126 I. C. C. 491, modified accordingly.

Lewis H. Rubin and Leo C. Seff for complainants.

M. B. Pierce, W. T. Pierson, and E. L. Dodrill for defendants.

[1] This report also embraces No. 17326, Clifton Paper Mills v. New York, Susquehanna & Western Railroad Company et al.

15 Report of the commission on further hearing

By the commission:

In the original report herein, 126 I. C. C. 491, decided May 7, 1927, division 3 found that sixth-class rates on imported wood pulp, in carloads, of 11.5 cents from Hoboken, N. J., 18.5 cents from Philadelphia, Pa., and 22.5 cents from Baltimore, Md., to Garfield, N. J., and 22.5 cents from Baltimore to Passaic-Dundee, N. J., were unreasonable. It prescribed reasonable rates for the future and awarded reparation. It further found that sixth-class rates of 12.5 cents on imported wood pulp, in carloads, from New York, N. Y., to Garfield and Passaic-Dundee were not unreasonable.

Upon petition of complainants and defendants these cases were reopened for further hearing in respect of the rates from New York and Hoboken to Garfield and Passaic-Dundee. The order requiring the establishment of a rate of 10.5 cents on imported wood pulp, in carloads, from Hoboken to Garfield was postponed indefiinitely.

Exceptions and replies thereto were filed by both complainant and defendants to the report proposed by the examiner, and oral argument was had. Our conclusions differ somewhat from those recommended by the examiner. Rates are stated in cents per 100 pounds. As in the original report herein, references to complainant are to the complainant in the title case.

Defendants assert that the movement from Hoboken to Garfield is intrastate and not subject to our jurisdiction. To determine this question it is necessary to understand the manner of conducting this business. Complainant makes an offer to a broker in New York for a certain quantity of wood pulp. The latter cables the
16 offer to a foreign mill and, if accepted by the latter, complainant is so advised. A contract is then made between complainant and the broker calling for a certain quantity of wood pulp to be delivered with a specified time on dock at New York harbor. Complainant thus knows the grade or quality of the wood pulp to be supplied but does not know the name of the foreign mill. The contract calls for delivery "on" or "ex" dock at New York and the price paid by complainant is based on delivery there. This is for the purpose of determining what portion of the total transportation charges is to be borne by each party. The wood pulp is marked abroad by a brand but not with complainant's name. It is consigned to the broker at New York. The bales destined for complainant may be only a part of a large cargo but the total number of bales alloted to it is always delivered at Garfield. Upon arrival of the pulp the broker receives notice from the steamship company and in turn notifies complainant. The complainant has previously been advised by the broker of the name of the steamer, expected date of arrival, and the amount of pulp in transit, this information being cabled the broker. The broker gives dock orders to the Hoboken Manufacturers' Railroad specifying delivery of the required number of bales, and makes out the bills of lading for the shipments to

Garfield. The bills of lading carry an entry "from S. S. * * *, Pier * * *, Hoboken, N. J." The broker has no authority to divert the goods to any other point. By arrangement between complainant and the broker the wood pulp is usually shipped in lots of two or three cars to enable complainant to unload promptly and thus prevent congestion on the industrial tracks at Garfield. Pulp is not shipped to the broker for sale to customers to be obtained after its arrival.

17 Defendants contend that the title to the goods does not pass to complaint by the terms of the contract until the broker at New York has taken affirmative action after the wood pulp has been unloaded by the steamship company on its docks; and that the movement thence by rail to Garfield is an entirely independent transaction. They urge that it is a reshipment of goods from a distributing point in intrastate commerce, and accordingly beyond our jurisdiction. Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336; Chi., Mil. & St. P. Ry. v. Iowa, 233 U. S. 334; Atl. C. L. R. R. Co. v. Standard Oil Co., 275 U. S. 257, are cited to support this view. On exceptions they state that there is no evidence to show a continuing intent of any of the parties that any specific bales comprising a part of the steamer shipment shall go to the complainant.

The record convinces us that the broker acts only as an agent, and that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield, and therefore, that the traffic is of the character over which we have jurisdiction. The time of passing title to complainant is immaterial in so far as the character of the transportation is concerned.

At the further hearing complaint testified that the tariffs publishing the commodity rates of 10 cents on wood pulp, in carloads, from Hoboken and New York Harbor to Piermont, N. Y., contained a provision making them subject to rule 77 of our Tariff Circular 18-A. Under this provision defendants agree to establish upon one day's notice rates at intermediate points not exceeding those to the next more distant points. In the original report division 3

18 found that the rate from New York to Piermont was unrestricted as to routing and would apply on shipments moving through Garfield. This is also true of the rate from Hoboken to Piermont. Since July 21, 1924, the revised rule 77 has provided that upon a showing of movement to the intermediate point the carrier would file application on our special docket for authority to make reparation on such shipments.

Effective October 11, 1927, defendants increased these rates to Piermont to 12.5 cents, thereby making them the same as the rate from New York to Garfield and 1 cent higher than the rate from Hoboken to Garfield. Defendants say this increase was made with the cooperation of receivers of freight at Piermont, and explain that the rates of 10 cents to Piermont were established effective August 14, 1922, because receivers of freight there could avail themselves of

water movement from New York Harbor, and because of carrier competition at adjacent points, to which there was in effect a rate of 10 cents and from which the goods could be drayed over to Piermont. Prior to that time the sixth-class rate of 12.5 cents applied to Piermont. The rates of 10 cents to Piermont are 80 per cent of sixth class. The rates of 11.5 cents and 12.5 cents from Hoboken and New York to Garfield are full sixth class. Eighty per cent of sixth class results in the rates sought of 9 and 10 cents, respectively. Effective January 3, 1928, defendants increased the rate from Hoboken to Garfield to 12.5 cents, stating that the rates from New York and Hoboken are generally on a parity because of carrier competition, and that at the time of one of the general rate increases, because of clerical error, the rate then in effect from Hoboken was reduced instead of increased. Complainant points out that approximately 80 per cent of sixth class is commonly in effect on wood pulp in
19 official territory wherever there is a movement as large as that here considered, and that in previous decisions we have prescribed commodity rates on wood pulp in trunk line and New England territories which averaged 82 per cent of the corresponding sixth-class rates. Reliance is placed upon the rates on wood pulp in carloads, from Wilmington, Del., to destinations in New England territory prescribed in Jessup & Moore Paper Co. v. B. & A. R. R., 122 I. C. C. 543, for distances from 160 to 600 miles. Using the scale prescribed on fertilizer in central territory in Ohio Farm Bureau Federation v. A. & W. Ry. Co., 120 I. C. C. 361, and that prescribed on manufactured iron and steel articles in that territory in Jones & Laughlin Steel Corp. v. B. & O. R. R. Co., 96 I. C. C. 682, as a basis, complainant has graded downward the scale in the Jessup & Moore Paper Co. case to a distance of 15 miles and produced a rate of 7 cents from Hoboken to Garfield. Three cents has been added for the New York lighterage, in accordance with Dixon Crucible Co. v. D. & H. Co., 109 I. C. C. 380. Complainant also compares the rate of 12.5 cents from New York to Garfield with rates on imported wood pulp, in carloads, of 9.5 cents from Philadelphia, Wilmington, Del., and Baltimore for distances ranging from 34 to 78 miles, and with rates from 8 to 10 cents from Boston, Mass., for distances ranging from 39 to 61 miles.

In the original report herein it was stated in connection with the reference to rates of 10.5 and 11.5 cents on wood pulpboard and building paper from Hoboken and New York, respectively, to Garfield:

As we have repeatedly said, it does not necessarily follow that rates on raw material are unreasonable because they are higher than rates on the finished product. Complainant recognizes this
20 as being our view, but urges that the evidence here before us justifies establishment of rates on wood pulp from and to the points considered lower than those in effect on its products.

Complainant renews its contention that the considerably greater value of wood pulp board and building paper justifies at least equal

rates on wood pulp, the material from which the former articles are manufactured. It insists that wood pulp does not fall within the category of by-products having no greater or lower value that the raw material. The values of $300 a net ton and from $80 to $105 a net ton for high grade building paper and wood pulp board, respectively, are contrasted with the average value of $55 a net ton for the wood pulp here considered.

As answering the apparent weight given in the original report to the high cost of lighterage at New York as justification of the rate of 12.5 cents, complainant cites Construction and Repair of Ry. Equipment, 128 I. C. C. 323, decided July 5, 1927, in which the Erie's contract with a company for the handling and lighterage of its shipments in New York harbor was severely criticised. It urges that the excessive cost incurred under such a contract can not be considered in determining the actual expense of this service. It admits that the usual lighterage allowance to shippers for the service is 3 cents per 100 pounds. Defendants assert that only the towing of the freight here considered was performed under the contract condemned in the case cited, the other items of cost being chargeable to boat hire, wharfage, and labor.

At the further hearing defendants directed their attention mainly to the jurisdictional question, relying upon the original record and report as proof of the reasonableness of the rates assailed.
21 However they compared the movement of lumber at sixth class under lighterage from New York harbor to destinations in New Jersey with the traffic here considered, pointing out that the transportation service is the same in both instances. The value of pine lumber is shown as $25 per net ton, about half that of the commodity here considered. The average loading of wood pulp, 52,387 pounds, is compared with the average loading of lumber, 57,262 pounds, and based on a rate of 12.5 cents the per car revenue on lumber is $6.10 greater. They also show that the Hoboken manufacturers' Railroad receives from the Hoboken rate of 11.5 cents, equivalent to $2.30 per net ton, an allowance of $1.35 per ton for its services in loading the car and moving it to the interchange point with the Erie at Weehawken, N. J., leaving 95 cents per ton for the remainder of the transportation service. We are not called upon here to decide whether or not this is a proper allowance. If the amount accruing to the Erie from the rates assailed is inadequate, the loss is not peculiar to this traffic alone but applies with equal or greater force to the lower commodity rates maintained to other destinations.

Defendants call attention to Handy Chocolate Co. *v.* B. & O. R. R. Co., 136 I. C. C. 311, dealing with the application of rule 77. Division 3 there found that the presumption of unreasonableness raised by the existence of lower rates to the more distant points was rebutted by the evidence of record. Defendants urge that a similar situation exists here because of the water competition to Piermont, and because of the 88 per cent circuity occasioned by the fact that the distance from Jersey City to Piermont via Suffern, N. Y., is 47

miles as compared with the short-line distance of 25 miles.
22 Their witness gave as his opinion that rule 77 could only be used in connection with natural and logical routes notwithstanding the fact that the tariff carried no routing restrictions. Upon reconsideration of that case, 146 I. C. C. 213, the finding of division 3 was reversed, it being pointed out that the publication of the rule in the tariff was a holding out by the carrier interested of a promise to apply the more distant point rates to intermediate points, and that the effect of the rule was substantially the same as that of an intermediate clause in the tariff, reparation being warranted regardless of the level of the lower rate.

Complainant maintains that in view of defendants' attitude that the rates of 12.5 cents to Piermont are reasonable, it is unreasonable to charge the same for a movement to Garfield, about half the distance over the short-line route. But distance is not the only element to be considered in the fixation of rates. Defendants do not admit that these rates to Piermont have reached the maximum of reasonableness, and further, a depressed rate is not a proper gauge to measure the reasonableness of other rates. Benson Produce Co. v. G. N. Ry. Co., 113 I. C. C. 541.

Defendants may for competitive reasons reduce or eliminate entirely the spread between the rates from New York Harbor points and Hoboken so long as they do not unduly prefer one locality or maintain rates so low as to unduly burden other traffic. Galveston Commercial Asso. v. A. & S. Ry. Co., 109 I. C. C. 114. But an order from us requiring them to do so must be supported by the record.

We find that the rate from Hoboken to Garfield was, is, and for the future will be unreasonable to the extent that it exceeded, exceeds, or may exceed 10 cents. We further find that the rate from New York Harbor to Garfield and Passaic-Dundee was unrea-
23 sonable to the extent that it exceeded 10 cents prior to October 11, 1927, but not thereafter. We further find that complainant Hamersley Manufacturing Company made the shipments as described and paid and bore the charges thereon; that it was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found reasonable; and that it is entitled to reparation with interest. The Clifton Paper Mills, complainant in No. 17326, should submit proof in affidavit form that it paid and bore the charges on the shipments described in the complaint. If defendants object to this method of proof a further hearing may be sought. Both complainants should comply with Rule V of the Rules of Practice.

An appropriate order for the future will be entered.

Brainerd, commissioner, dissenting in part:

For reasons indicated in my dissent to the report on reconsideration in Handy Chocolate Co. v. B. & O. R. R. Co., 146 I. C. C. 213, I dissent from the finding that the rate 12.5 cents charged on complainant's shipments of pulp wood which moved prior to October

11, 1927, from New York Harbor to Garfield and Passaic-Dundee was unreasonable, and from the award of reparation thereon.

I am authorized to say that Commissioner Woodlock joins in this expression.

Taylor, commissioner, dissenting:

I can not agree with this report in so far as it differs from the original decision herein.

Meyer, commissioner, dissents.

Commissioners Aitchison and Farrell did not participate in the disposition of these cases.

24

Order

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of November, A. D. 1928

No. 16531

THE HAMERSLEY MANUFACTURING COMPANY

v.

ERIE RAILROAD COMPANY, READING COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, the Central Railroad Company of New Jersey, the Lehigh and Hudson River Railway Company, and Hoboken Manufacturers Railroad Company

No. 17326

CLIFTON PAPER MILLS

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, ERIE Railroad Company, Bush Terminal Railroad Company, and the Pennsylvania Railroad Company

In appearing that on May 7, 1927, division 3 entered its report and order in the above-entitled proceeding, and that on October 3, 1927, these proceedings were reopened for further hearing.

It further appearing that such further hearing has been had and that the commission, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon which said report on further hearing and the report and order of May 7, 1927, are hereby referred to and made a part hereof:

25 It is ordered that the said order of May 7, 1927, be, and it is hereby, modified by eliminating from the table contained therein the following:

Hoboken, N. J.	Garfield, N. J.	10.5

but that in all other respects the said order shall remain in full force and effect.

It is further ordered that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 10, 1929, and thereafter to abstain, from publishing, demanding, or collecting their present rates for the transportation of imported wood pulp, in carloads, from and to the points specified in the next succeeding paragraph.

It is further ordered that said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before January 10, 1929, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of imported wood pulp, in carloads, from Hoboken, N. J., to Garfield, N. J., a rate which shall not exceed 10 cents per 100 pounds.

And it is further ordered that this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

26 *Exhibit B to petition*

Interstate Commerce Commission

No. 16531 [1]

HAMERSLEY MANUFACTURING COMPANY

v.

ERIE RAILROAD COMPANY ET AL

Submitted September 28, 1926. Decided May 7, 1927

Rates on imported wood pulp, in carloads, from Hoboken, N. J., Philadelphia, Pa., and Baltimore, Md., to Garfield, N. J., and from Baltimore to Passaic-Dundee, N. J., found unreasonable. Reasonable rates prescribed for the future and reparation awarded.

Rates on imported wood pulp, in carloads, from New York, N. Y., to Garfield and Passaic-Dundee found not unreasonable.

Lewis H. Rubin and Leo C. Seff for complainant.

Marion B. Pierce and William F. Zearfaus for defendants.

[1] This report also embraces No. 17326, Clifton Paper Mills v. New York, Susquehanna & Western Railroad Company et al.

Report of the Commission

Division 3, Commissioners Hall, Campbell, and Woodlock

By Division 3:

Exceptions were filed by defendants to the report proposed by the examiner, complainants replied, and the case was orally
27 argued. Our conclusions differ somewhat from those recommended by the examiner.

By its complaint in the title case, filed December 4, 1924, the Hamersley Manufacturing Company, a corporation manufacturing parchment and waxed wrapping paper, alleges that the carload rates on imported wood pulp, in rolls and bales, from New York, N. Y., Hoboken, N. J., Philadelphia, Pa., and Baltimore, Md., to Garfield, N. J., were and are unjust and unreasonable. We are asked to prescribe reasonable rates for the future and to award reparation on shipments which moved subsequent to January, 1923, and during the pendency of the proceeding. By its complaint in No. 17326, filed July 15, 1925, as amended, the Clifton Paper Mills, a corporation manufacturing fibre paperboard, makes similar allegations with respect to the sixth-class rates of 22.5 and 12.5 cents, respectively, on like traffic from Baltimore and New York to Passaic-Dundee, N. J. The prayer is for reparation on shipments which moved during the period from July 24, 1923, to March, 1925, and reasonable rates for the future. Upon agreement of the parties thereto the latter case was submitted upon the record made in the title case and references hereinafter to complainant are to the complainant in the title case. Unless otherwise indicated, rates are stated in cents per 100 pounds.

Garfield is a local point on the Erie about 12.5 miles north and west of Jersey City, N. J. The wood pulp was imported from Europe. The record shows a movement to Garfield of 944 carloads during the period covered by the complaint and up to the time of the hearing, 566 of which moved from New York Harbor points via Long Dock, Jersey City, 306 from Hoboken, 43 from Philadelphia, and 39 from Baltimore. Charges were collected at sixth-class
28 rates of 12.5, 11.5, 18.5, and 22.5 cents, respectively, subject to a minimum of 40,000 pounds.

Wood pulp is desirable traffic. It loads heavily, moves in regular volume, and is not susceptible to damage in transit. It is shipped in bales bound with heavy rope or iron bands and weighs from 250 to 500 pounds. Its value is 2.75 cents per pound. The average weight of the shipments was 52,000 pounds. No damage claims were filed on these shipments. Imported wood pulp is said to contain 10 per cent of moisture. During the period from December 4,

1922, to April 1, 1925, complainant received on an average approximately 8 carloads of wood pulp a week, at times receiving lots of from 10 to 20 cars.

In the following table compiled from exhibits the rates assailed are compared with commodity rates on like traffic instanced by complainant. The sixth-class rates, and the rates sought, are also shown. Complainant stresses particularly the rates to Piermont and Orangeburgh, N. Y., and Hamburg, N. J., points in the same general territory as Garfield, to which there is a movement of imported wood pulp. In its other comparisons it selected destinations at which paper mills are located, but had no definite knowledge as to the volume of the movement.

From—	To—	Short line distance (miles)	Present rate (cents)	Sixth-class rate (cents)	Rate sought (cents)
Hoboken, N. J.	Garfield, N. J.	15	11.5	11.5	9
"	Delaware, N. J.	79	11.5	16	
"	Water Gap, Pa.	82	11.5	17.5	
Philadelphia, Pa.	Marcus Hook, Pa.	17	9.5	11.5	
"	Wilmington, Del.	26	9.5	13	
Baltimore, Md.	York, Pa.	55	9.5	15.5	
"	Providence, Md.	55	*$1.89	17.5	
"	Marley Mills, Md.	52	*$1.89	17.5	
New York, N. Y.	Garfield, N. J.	[1] 20	12.5	12.5	10
"	Piermont, N. Y.	[1] 30	10	16	
"	Hamburg, N. J.	[1] 66	15.5	24	
"	Orangeburgh, N. Y.	[1] 27	10	12.5	
Jersey City, N. J.	Orangeburgh, N. Y.	25	9	10	
"	Piermont, N. Y.	25	9	9.5	
"	Salisbury Mills, N. Y.	63	9.5	12.5	
"	Water Gap, Pa.	96	10	14.5	
Philadelphia, Pa.	Garfield, N. J.	101	18.5	18.5	16.5
Baltimore, Md.	"	196	22.5	22.5	20.5
Philadelphia, Pa.	Binghamton, N. Y.	221	21.5	25	
"	Johnsonburg, Pa.	342	22	26.5	
Baltimore, Md.	Albany, N. Y.	339	22.5	25	
"	Fulton, N. Y.	393	21.5	25	
"	Haverhill, Mass.	432	27	30.5	
"	Piermont, N. Y.	210	20.5	22.5	
"	Newburgh, N. Y.	251	21.5	22.5	
"	Salisbury Mills, N. Y.	251	21.5	22.5	

* Rate per net ton.
[1] 8.5 miles constructive mileage added to distance from Jersey City.

30 As no routing restrictions are published in connection with the rate on this traffic from New York to Piermont and Orangeburgh it would apply on shipments moving through Garfield and Suffern, N. Y. The rates from Baltimore to Newburgh and Salisbury Mills were recently established upon application of a concern operating paper mills at the latter points. Prior to their establishment sixth-class rates applied.

Rates of 10.5 and 11.5 cents which complainant instances on woodpulp board, building paper, and roofing paper from Hoboken and New York, respectively, to Garfield, 16.5 cents on woodpulp board between Philadelphia and Garfield, and 20.5 cents on woodpulp board between Baltimore and Garfield, are equivalent to 90 per cent of the sixth-class rates. This basis was found reasonable for maximum

rates on the commodities named between points in official territory in Building and Roofing Paper and Paper Board Rates, 52 I. C. C. 84. As we have repeatedly said, it does not necessarily follow that rates on raw material are unreasonable because they are higher than rates on the finished product. Complainant recognizes this as being our view, but urges that the evidence here before us justifies establishment of rates on wood pulp from and to the points considered lower than those in effect on its products.

Under a distance scale maintained by the Boston & Maine the rates applicable on wood pulp from Boston, Mass., to Salem, Mass., 16 miles, Nashua, N. H., 40 miles, and Fitchburg, Mass., 50 miles, are 8, 10, and 11 cents, respectively, and average 78 per cent of the sixth-class rates. Rates of 12.5 cents applicable on wrapping paper from Hoboken to Piermont, 24 miles, and on waste paper from New York to Piermont, 30 miles, are equivalent to 78 per cent of
31 the sixth-class rates. Complainant also instances for comparative purposes rates of 9.5 cents on castor oil, cottonseed oil, linseed oil, peanut oil, and cocoanut oil from New York to Rahway, N. J., 20 miles; 10 and 9.5 cents, respectively, on manufactured iron and steel from New York to Perth Amboy, N. J., 35 miles, and New Market, N. J., 36 miles; 11.5 cents on plumbago from New York to Bloomsburg, N. J., 74 miles; 9 cents on sulphate of ammonia from Waverly, N. J., to New York, 20 miles; and 9.5 cents on asphaltum from Perth Amboy to New York. With the exception of sulphate of ammonia and asphaltum, which are rated sixth class, the commodities named are rated fifth class in official classification and are more valuable than wood pulp.

In support of their contention that the class rates assailed are reasonable for the movement of wood pulp from and to the points here considered defendants urge that the sixth-class rating accorded the traffic is based on value, hazards of transportation, weight, service required, stage of manufacture, method of packing, and other classification elements, that it is the lowest rating in the official classification, and that it is applied on lumber, brick, clay, cement, lime, stone, ore, scrap material such as cullet and scrap iron, and other heavy-loading commodities of comparatively low value. They assert that although many commodity rates are published on the latter commodities there is a considerable movement under class rates; and that we have in many cases found class rates on these commodities not unreasonable. As the wood pulp here considered has been through a chemical process in its manufacture defendants do not consider it a raw material.

According to defendants rates from New York and Hoboken to Piermont and other points in the Hudson River Valley are depressed by water competition and are lower than the rates from New
32 York in any other direction. They assert that wood pulp moved by water to Piermont during the Federal control period and during the switchmen's strike of 1920, but admit that it would not ordinarily move by water to Hamburg and Orangeburgh. There

is a movement of wood pulp from Jersey City to Dundee, N. J., 12 miles, Bogota, N. J., 13 miles, Newburgh, 64 miles, and from New York to Whippany, N. J., 28 miles; under sixth-class rates of 12.5 and 16 cents, respectively. A commodity rate of 15.5 cents applicable on this traffic from Jersey City to Butler, N. J., 37 miles, is one-half cent lower than the sixth-class rate. Lumber, a commodity less valuable than wood pulp, moves in considerable volume from New York to Garfield and other nearby points in New Jersey under sixth-class rates.

A rate of 9 cents applicable on this traffic from Philadelphia to Pencoyd, Pa., 16 miles, and Miquon, Pa., 11 miles, instanced by defendants, is 2.5 cents less than the sixth-class rate. A rate of 7.5 cents from Philadelphia to Port Richmond, Pa., for a haul somewhat less than a mile includes a loading charge of 2.5 cents. During the three-months period from June to September, 1924, 55 carloads of wood pulp moved from Philadelphia to Pencoyd and 45 to Port Richmond. The rates from Philadelphia to Pencoyd, Port Richmond, Miquon, and other points at short distances from Philadelphia are said to be depressed by motor-truck competition, and that from Philadelphia to Marcus Hook by water competition. A commodity rate of 18.5 cents from Philadelphia to Bogota and Passaic, N. J., is equivalent to the sixth-class rates.

A statement submitted by defendants purports to show that the average cost of the lighterage service performed in connection with
33 55 carloads of wood pulp shipped from New York harbor points to Garfield during September and October, 1924, was $1.49 per ton; and that, after adding to this amount 28 cents per ton for yard expenses at Jersey City and Croxton, N. J., and per diem charges less demurrage, there remains of the $2.50 per ton revenue for the road haul from Jersey City to Garfield, through a congested district, 73 cents, or approximately 3.6 cents per 100 pounds. No lighterage service was performed on the shipments from Hoboken, Philadelphia, and Baltimore.

Defendants urge that commodity rates maintained on wood pulp from Philadelphia and Baltimore to destinations in New York and New England were established as the result of carrier or port competition and are depressed to a subnormal basis. Upon learning that there was a movement of this traffic to Piermont, the Baltimore & Ohio and its connections, desiring to participate therein, established the 20.5-cent rate to that point from Baltimore. This rate is related to the rates from the same point of origin to Albany and Buffalo. Defendants stress the fact that this traffic moves from Baltimore to Garfield over four lines, the Baltimore & Ohio to Philadelphia, Philadelphia & Reading to Bethlehem, Pa., Lehigh & Hudson to Greycourt, and Erie beyond, 298 miles. Based on this distance the 22.5-cent rate from and to these points yields 15 mills per ton-mile. The route over which the shipments from Philadelphia moved is not shown.

A statement submitted by defendants shows 16 destinations in New York to which there was a movement of this traffic from Baltimore during the period from August, 1922, to December, 1923, under sixth-class rates ranging from 22.5 to 35 cents for hauls varying from 205 to 527 miles. Volume of movement is not indicated. Shipments which moved under sixth-class rates from Baltimore to points in New Jersey, Pennsylvania, New York, and Maryland during January and February, 1925, ranged in weight from 17 to 72 tons. Defendants concede that many commodity rates lower than sixth class are maintained on wood pulp from Baltimore to destinations in New York and New Jersey. It was stated that the Baltimore & Ohio would consider reducing the rates from Baltimore to Garfield if assured that additional tonnage would result.

During the year 1924, 94 carloads of wood pulp moved from Philadelphia to 22 destinations in Pennsylvania, New Jersey, New York, Connecticut, and Vermont under sixth-class rates varying from 11.5 to 30.5 cents for hauls ranging from 17 to 627 miles. Of these, 22 carloads moved to Buck Run, Pa., 11 to Garfield, and 9 to Sheldon Falls, Vt. Shipments of from 1 to 6 carloads moved to the other 19 destinations. Commodity rates maintained on this traffic from Philadelphia to Plattsburg, Ausable Forks, Willsborough, and Warrensburgh, N. Y., where paper mills are located, are on the same basis as the sixth-class rates. Wood pulp moves from Piedmont, W. Va., to Tyrone, Pa., 125 miles, under a commodity rate of $3.78 per ton, yielding ton-mile earnings of 30 mills.

Defendants also point out that the loading charge of 50 cents per ton on this traffic at Philadelphia and Baltimore is absorbed by the carriers where the rate charged is 9 cents or higher, and that the Baltimore & Ohio receives a considerable volume of wood pulp moving through Baltimore from the Canton Railroad on which it is required to absorb a switching charge of 25 cents per ton in addition to the loading charge. None of the shipments under consideration was handled by the Canton Railroad.

Defendants insist that the ability of wood pulp to bear a relatively high rate is indicated by the fact that it moves from points in Canada to New York and New Jersey at rates ranging from 30 to 40 cents. They also introduced an exhibit showing sixth-class rates from Baltimore to various destinations in Pennsylvania, Delaware, Maryland, and New Jersey, under which there was a movement of oyster shells, lumber, pig lead, and cottonseed meal, and assert that cullet, a very low-grade commodity, moves in considerable volume from Baltimore to points in West Virginia under sixth-class rates.

We find that the rates assailed from Hoboken, Philadelphia, and Baltimore to Garfield were, are, and for the future will be unreasonable to the extent that they exceeded, exceed, or may exceed 10.5, 16.5, and 20.5 cents, respectively, and from Baltimore to Passaic-Dundee, N. J., 20.5 cents.

We further find that the rate assailed from New York to Garfield and Passaic-Dundee was not unreasonable.

We further find that the Hamersley Manufacturing Company made shipments of wood pulp, in carloads, from Hoboken, Philadelphia, and Baltimore to Garfield subsequent to January, 1923, as described, and that it paid and bore the charges thereon, was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found reasonable, and is entitled to reparation, with interest.

We further find that on shipments of wood pulp, in carloads, from Baltimore to Passaic-Dundee during the period from July 24, 1923, to March, 1925, on which the Clifton Paper Mills, complainant in No. 17326, paid and bore charges at the sixth-class rate of 22.5 cents, it was damaged in the amount of the difference between the charges so paid and borne and those which would have accrued at the rate of 20.5 cents herein found reasonable, and is entitled to reparation with interest. It may submit proof in affidavit
36 form of shipments made during the period on which it paid and bore the charges.

Complainants in both cases should comply with Rule V of the Rules of Practice.

An appropriate order will be entered.

Commissioner Woodlock dissents.

Order

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 7th day of May, A. D. 1927

No. 16531

THE HAMERSLEY MANUFACTURING COMPANY

v.

ERIE RAILROAD COMPANY, READING COMPANY, THE BALTIMORE & OHIO Railroad Company, the Central Railroad Company of New Jersey, the Lehigh & Hudson River Railway Company, and Hoboken Manufacturers Railroad Company

No. 17326

CLIFTON PAPER MILLS

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, ERIE Railroad Company, Bush Terminal Railroad Company, and the Pennsylvania Railroad Company

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full

investigation of the matters and things involved having been
37 had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 6, 1927, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of imported wood pulp, in carloads, from and to the points set forth in the table below, which exceed the rates therein prescribed.

It is further ordered that said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 6, 1927, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of imported wood pulp, in carloads from and to the points set forth in the table below, rates in cents per 100 pounds which shall not exceed the rates therein set forth:

From—	To—	Rate (cents)
Hoboken, N. J.	Garfield, N. J.	10.5
Philadelphia, Pa.	do	16.5
Baltimore, Md.	do	20.5
Do.	Passaic-Dundee, N. J.	20.5

And it is further ordered that this order shall continue in force until the further order of the commission.

By the commission, division 3.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

I hereby certify that the foregoing is a true copy of the original on file in my office.

[SEAL.] GEORGE T. CRANMER, *Clerk.*

38 In United States District Court

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed Dec. 19, 1928

To the honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Inter-

state Commerce Commission, as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

DANIEL W. KNOWLTON.
E. M. REIDY.

39 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Dec. 19, 1928

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, hereinafter called the commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I, II, III, and VIII of the petition, the commission admits, for the purposes of this suit, that the allegations therein contained are true, except that the commission denies the suit was commenced or may be maintained under the general equity jurisdiction of the court.

40 II

Answering Paragraphs IV, V, VI, and VII and Paragraphs IX to XIII, inclusive, of the petition, the commission admits and alleges that it made and entered the order dated May 7, 1927, referred to in Paragraph IV, in a proceeding then pending before it entitled Hamersley Manufacturing Company v. Erie Railroad Company et al., which embraces Docket No. 16531; that said proceeding was instituted pursuant to complaint filed in the commission's office by the Hamersley Manufacturing Company of Garfield, N. J., whereby reasonableness of rates on imported wood pulp, in rolls and in barrels, in carloads, moving from foreign countries through the ports of New York, Philadelphia, Hoboken, and Baltimore, and transshipped by rail from Long Dock and Hoboken, N. J., Philadelphia and Baltimore, to Garfield, N. J., were brought in issue and reparation was sought; that answers to the issues so raised were filed by the petitioners herein, as well as other carriers; that full hearings were had and thereafter the commission made and entered and served upon all the parties in said proceeding, the report and order of May 7, 1927, which is attached to and made a part of the petition

as "Exhibit B," to which the commission respectfully refers the court for information concerning its findings and requirements in the premises; that following the service of the commission's report and order of May 7, 1927, both parties to the proceeding before the commission, including the petitioners herein, filed applications for rehearing and exceptions; that pursuant to said applications the proceeding was reopened and further hearings held; and that subsequently the commission made and entered and served upon all the parties in said proceeding report and order of November 2, 1928, referred to and made a part of the petition as "Exhibit A," to which the commission respectfully refers the court for information concerning its findings and requirements in the premises; that in
41 said proceedings the parties thereto, including the petitioners herein, were, and each of them was, accorded the full hearing provided for by the interstate commerce act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said report and order was submitted to the commission for consideration, including testimony and other evidence submitted on behalf of petitioners herein by their counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the commission for determination on behalf of said parties by their respective counsel, including the particular questions raised by petitioners in this suit, whereupon the commission determined said matters and entered and served upon all the parties to said proceedings, including the petitioners herein, its said reports and orders; that said reports and orders included the commission's findings of fact, decision, conclusions, order, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the commission made the findings and stated the conclusions, upon which said orders are based.

The commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the petition herein.

The commission further alleges that said orders were not
42 made or entered either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders the commission did not exceed the authority which had been duly conferred upon it, and the commission denies each of and all the allegations to the contrary contained in the petition.

Further answering Paragraph VI of the petition, the commission denies each of and all the allegations therein contained.

Further answering Paragraph VII of the petition, the commission admits that unless its said order of November 2 is complied with petitioners may become subject to fines and penalties; but the commission denies that petitioners will suffer irreparable injury unless its said order of November 2 is enjoined and suspended.

Further answering Paragraphs X and XI of the petition, the commission denies the allegations therein contained, except that the commission admits that in its report it used language set forth in said paragraphs, to which report the commission refers the court for more full and complete information in the premises.

Further answering Paragraph XIII of the petition the commission denies that the petitioners will suffer irreparable damage, or any damage, if its said order of November 2, 1928, is not stayed and enjoined.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders of May 7, 1927, and November 2, 1928, which reports and orders are hereby referred to and made a part hereof.

43 All of which matters and things the commission is ready to aver, maintain, and prove, as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By E. M. REIDY,
Assistant Chief Counsel.

DANIEL W. KNOWLTON,
Of Counsel.

[*Duly sworn to by J. B. Campbell; jurat omitted in printing.*]

44 In United States District Court

[Title omitted.]

Answer of the United States

Filed Dec. 19, 1928

United States for answer to the petition filed herein against it says:

I, II, III. Respondent admits the statements and allegations contained in Paragraphs I, II, and III of the petition, with this exception: That it denies the allegation in Paragraph II that the suit is brought also under the general equity jurisdiction of this court.

IV. Respondent admits that the Interstate Commerce Commission (hereinafter called the commission) made and entered the orders on

the dates and in the proceedings described and alleged in Paragraph IV of the petition and annexed thereto with the commission's reports therein as Exhibit A and Exhibit B to the petition.

V. Answering Paragraph V of the petition, respondent admits that said order of November 2, 1928 (Exhibit A, page 20, of petition), requires petitioners to establish, maintain, and apply on or before January 10, 1929, to the transportation of wood pulp, in carloads, imported into this country and by them transported from Hoboken, N. J., to Garfield, N. J., the rate prescribed in said order, and that said rate so prescribed is lower than the present rate applicable to the transportation of wood pulp between said points.

VI. Respondent denies each and every allegation of Paragraph VI to the petition and alleges (a) that said order, and findings of the commission upon which it is based, is amply supported by
45 substantial evidence properly before the commission in the proceeding in which it was made; (b) that the commission has jurisdiction over the traffic and transportation involved in said report and order and is empowered by the provisions of the interstate commerce act to make said order.

VII. Respondent has not sufficient knowledge or information of the allegations contained in Paragraph VII of the petition upon which to form a belief and therefore neither admits nor denies said allegations except (1) it admits that petitioners may be subject to a penalty of $5,000 per day for failure to obey said order while in effect; (2) it denies that petitioners will suffer irreparable injury if said order is not enjoined and annulled.

VIII. Respondent admits the allegations contained in Paragraph VIII of the petition.

IX. Respondent has not sufficient knowledge or information to form a belief concerning the allegation contained in the first sentence of Paragraph IX of the petition. It admits the remaining allegations of said Paragraph IX.

X. Answering Paragraph X of the petition, respondent admits that the commission's report "on further hearing" (page 16 of Exhibit A annexed to the petition) contains the statement quoted in said Paragraph X, but respondent denies the remaining allegations and conclusions pleaded in that paragraph and alleges that the testimony of record before the commission amply supports the statement quoted from its report.

XI. Respondent admits that the report of the commission, Exhibit A, sheet 2, contains the statement quoted in Paragraph XI of the petition and denies the remaining allegations of that paragraph.

XII. Answering Paragraph XII of the petition, respondent denies that in making its said report and order the commission
46 omitted to consider and recite any pertinent and relevant facts of record with respect to the circumstances surrounding the transportation involved.

Wherefore, having fully answered respondent prays that the petition be dismissed at the cost of the petitioners and for such other and further order as may be appropriate.

ELMER B. COLLINS,
Special Assistant to the Attorney General.
WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
PHILIP FORMAN,
United States Attorney.

47 [*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*]

48 In United States District Court

[Title omitted.]

Before Circuit Judge, Davis; Districts Judges, Rellstab and Bodine

Opinion

(Filed Dec. 26, 1928)

This is an application for a temporary and permanent injunction restraining the enforcement of, and annulling and setting aside, a certain order of the Interstate Commerce Commission dated November 2, 1928, requiring the Erie Railroad Company and the Hoboken Manufacturers Railroad Company to publish and maintain on or before January 10, 1929, a rate of 10¢ per one hundred pounds from Hoboken, N. J., to Garfield, N. J., for the transportation of wood pulp, in carloads, which has at some time lately been imported into the United States from a foreign country.

The jurisdiction of this court to hear and determine is conceded.

The Hammersley Manufacturing Company which instigated the proceeding before the Interstate Commerce Commission is engaged in the manufacture of paper at Garfield, N. J. It requires in its business wood pulp. The wood pulp comes from abroad, prin-
49 cipally from German ports. Messrs. J. Anderson & Company and Ira L. Beebe & Company, both of New York, appear to be brokers for the foreign producers of wod pulp and also brokers through whom the American manufacturers of paper purchase the pulp as required.

When the Hammersley Manufacturing Company requires pulp, it enters into a contract of purchase with J. Anderson & Company or Ira L. Beebe & Company, which, so far as pertinent, states that Anderson & Company or Beebe & Company have sold to the Hammersley Manufacturing Company a given quantity of wood pulp designated by its German name, delivery ex-dock New York (Harbor), shipments from abroad. When the pulp arrives, it is loaded upon the cars of the Erie Railroad Company at Hoboken. It

is a fact that German vessels generally dock on the New Jersey side of New York Harbor. The railroad company issues bills of lading for shipments from Hoboken to Garfield.

The transaction between the Hammersley Manufacturing Company and the brokers resulting in the contract referred to originates either by the offer by the New York broker to sell or the offer by the Hammersley Manufacturing Company to buy. The New York brokers cable the German producers the terms of the offer and the names of the customers, and the New York broker before entering into the contract with the American manufacturer receives a reply cable of confirmation before executing the contracts. The foreign bills of lading are addressed to the New York brokers who pay for the pulp when it is on the ship in the foreign port. Pulp which is to be distributed to several manufacturers in the United States is shipped in bulk under one bill of lading to the New York brokers, who distribute it in accordance with the terms of the contracts which they have previously made.

Everything which is done with the pulp after its arrival in
50 the United States is controlled by the New York broker. He has paid for the pulp at the foreign port. It is his pulp. He can assign it in accordance with his contracts, or if he repudiates his contracts he would have to stand suit upon them. The railroad company has nothing to do with determining the ultimate destination of the pulp. The New York brokers make the contracts with the railroad company for the delivery of the pulp from the ship to its ultimate destination.

The position of the Erie Railroad Company and the Hoboken Manufacturers Railroad Company is that the commission is without power to fix a rate for the transportation of wood pulp in carload lots from Hoboken, N. J., to Garfield, N. J., under the facts in this particular case.

In Gulf, Colorado and Santa Fe Rwy. Co. v. Texas, 204 U. S. 403 at 412, the single question was whether a shipment of corn between Texarkana, Texas, to Goldthwaite, Texas, was an interstate or intrastate shipment. The Supreme Court held that this question was determined by the original contract of shipment, and that the contract governed until it was changed by the agreement of the owner and the carrier.

This rule was somewhat modified by subsequent decisions of the Supreme Court, and in B. & O. S. R. R. Co. v. Settle et al, 260 U. S. 166 at 170, Mr. Justice Brandeis stated:

"Whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. Southern Pacific Terminal Co. v. Interstate Commerce Commissioner, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Railroad Commission

of Louisana v. Texas & Pacific Ry. Co., 229 U. S. 336. And in Baer Brothers Merchantile Co. v. Denver & Rio Grande R. R. Co., 233 U. S. 479, 490, this Court held that a carrier cannot, by
51 separating the rate into its component parts, charging local rates and issuing local waybills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a thorough interstate movement."

The court held in that case that the intention of the shipper to ship through governed the character of the movement.

Mr. Chief Justice Taft in Atlantic C. L. R. R. v. Standard Oil Co., 275 U. S. 269 states the facts as follows:

"The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal."

The court held that the transportation from the seaboard points to the inland points in Florida was an intrastate shipment. The general rules of law are stated as follows:

"The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of a movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars. Chicago, M. & St. P. Ry. Co. v. Iowa, 223 U. S. 334. The change from rail to ship has often been held consistent with a continuity of interstate or foreign commerce, even though there may be only local billing. Texas &
52 New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336; Baer Bros. Mercantile Co. v. Denver & Rio Grande Railroad Co., 233 U. S. 479. On the other hand, in Chicago M. & St. P. Ry. Co. v. Iowa, supra, the reshipment of an interstate ship-

ment of coal after its arrival in the state in the same carload lots was held not inconsistent with the change from interstate to intrastate commerce. In Baltimore & Ohio S. W. R. R. Co. v. Seattle, 260 U. S., 166, 170, a shipper billed his goods from one state to another, paying the interstate freight and reshipped them to another point in the second state, intending from the first to reach the latter destination, but interrupting the transportation only to take advantage of a difference in his favor between the through rate and the sum of those paid. It was held that the essential nature of the entire movement was in interstate commerce and that the shipper must pay the only lawful rate, which was the interstate commerce rate to the final destination. These cases are illustrations to show that the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it."

In the present case the essential character of the transaction is in intrastate and not interstate commerce. If the test be the intention of the foreign shipper, suffice it to say that he has the money before the pulp leaves the foreign port and he has it from the New York brokers. How can it be said that he has any concern or any intention that pulp should reach the Hammersley Manufacturing Company or anyone else? And if he did have such intention, what of it since the New York broker has title until the pulp is delivered on board the cars at Hoboken.

Further than that mere knowledge by the foreign shipper that the pulp sold to the New York broker is purchased for resale can not make the shipment by the New York broker to his New Jersey vendee a part of the original movement. If loss has occurred at sea, it would not fall on the Hammersley Company, because it has no title. It would fall, however, on the New York broker, because he has paid for the goods. So it would seem that a new movement starts when the New York broker takes a bill of lading from the railroad
53 for shipment to Garfield. Goods purchased by every New York merchant abroad are in exactly the same category, except for this, that the ordinary merchant only hopes to sell his goods. The New York broker has a contract for resale in each case, but that alone can hardly be said to be sufficient to give a different character to the shipment of the goods.

It is to be borne in mind that there are always two transactions. The American manufacturer deals with the New York broker for obvious reasons. The foreign producer deals with the New York broker for similar reasons. The pulp belongs to the broker when it arrives in New York Harbor, and he initiates the rail transportation. Without the independent act of the New York broker the pulp would never move beyond New York Harbor. The broker stands in the transaction not as a means of changing the nature of the transaction but as the instigator of an independent transaction.

The relief prayed for will be granted.

54 In United States District Court

ERIE RAILROAD COMPANY ET AL., A CORPORATION, PETITIONERS

vs.

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE Commission, intervening defendant

Final decree

Filed Dec. 26, 1928

Before the Honorable J. Warren Davis, United States Circuit Judge, Honorable Joseph L. Bodine, and the Honorable John Rellstab, sitting in the District Court pursuant to urgent deficiencies act (38 Stat. 220)

This cause came on to be heard at this term before a statutory court, as provided by statute, on the return of the order to show cause allowed herein on December 17, 1928, why the interlocutory injunction prayed for in the petition should not issue, and all the parties having stipulated in open court that the cause should be considered and disposed of as on final hearing, the cause was considered on the petition, answers, and evidence submitted, as on final hearing, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the order of the Interstate Commerce Commission in the case entitled "Hammersley Manufacturing Corporation vs. Erie Railroad Company et al.," No. 16531, entered at a general session of the commission at its office in Washington, D. C., on November 2nd, 1928, be and the same is hereby set aside, annulled, and suspended.

2. That a permanent injunction be and the same is hereby granted and issued out of this court as prayed in the petition, enjoining the enforcement, execution, and operation of said order; and the defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be and
55 they are hereby permanently restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.

Dated Trenton, N. J., Dec. 26, 1928.

By the court:

J. WARREN DAVIS,
United States Circuit Judge.
J. L. BODINE,
United States District Judge.
JOHN RELLSTAB,
United States District Judge.

[File indorsement omitted.]

56 In United States District Court

[Title omitted.]

Petition for appeal by United States and Interstate Commerce Commission

Filed Jan. 21, 1929

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the final order or decree of the District Court entered December 26, 1928, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD M. REIDY,
Attorney for Interstate Commerce Commission.

57 In United States District Court

[Title omitted.]

Order allowing appeal

Filed Jan. 21, 1929

In the above-entitled cause, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, entered December twenty-sixth, 1928, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, pro-

ceedings, and papers on which the order or decree was made and entered to the Supreme Court of the United States.

Dated January 19th, 1929.

J. L. BODINE, *U. S. D. J.*

58 Service of the foregoing order allowing appeal and the receipt of a copy thereof are hereby acknowledged this 19th day of January, 1929.

MARION B. PIERCE,
Solicitor for Erie Railroad Company and Hoboken Manufacturers' Railroad Company.

59 In United States District Court

[Title omitted.]

Notice of appeal

Filed Jan. 21, 1929

TO ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, COMPLAINANTS:

Please take notice that, pursuant to the statutes and rules of Court in such case made and provided, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, and each of them, do hereby appeal to the Supreme Court of the United States from the final order or decree of the District Court made and entered on the twenty-sixth day of December, 1928, which set aside, annulled, suspended and permanently enjoined that portion of a certain order of the Interstate Commerce Commission in the proceeding entitled "Docket 16531, The Hamersley Manufacturing Company *v.* Erie Railroad Company et al.," 148 I. C. C. 47, filed November 2, 1928, that prescribed rates on imported wood pulp, carloads, from Hoboken, N. J., to Garfield, N. J.

60 January 19, 1929.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD M. REIDY,
Attorney for Interstate Commerce Commission.

Service of the foregoing notice of appeal and the receipt of a copy thereof are hereby acknowledged this 19 day of January, 1929.

MARION B. PIERCE.
Solicitor for Erie Railroad Company and Hoboken Manufacturers' Railroad Company.

61 In United States District Court

[Title omitted.]

Notice of appeal

Filed Jan. 21, 1929

To Honorable EDWARD L. KATZENBACH,
Attorney General of the State of New Jersey:

You are hereby notified that the defendants, United States of America and Interstate Commerce Commission, have taken an appeal from the final order or decree of the District Court, entered December twenty-sixth, 1928, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD M. REIDY,
Attorney for Interstate Commerce Commission.

62 Service of the foregoing notice and the receipt of a copy thereof are hereby acknowledged this 19th day of January, 1929.

EDWARD L. KATZENBACH,
Attorney General, State of New Jersey.

63 In United States District Court

Assignment of errors

Filed Jan. 21, 1929

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, by their respective counsel, now come and in connection with their petition for appeal file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December twenty-sixth, 1928.

The District Court erred—

1. In setting aside, annulling, and suspending an order of the Interstate Commerce Commission, dated November 2, 1928, in Docket No. 16531, Hamersley Manufacturing Company v. Erie Railroad Company et al., 148 I. C. C. 47, and in granting and
64 issuing a permanent injunction enjoining the enforcement, execution, and operation of said order.

2. In finding and holding that "the essential character of the transaction is in intrastate and not interstate commerce."

3. In finding and holding "that a new movement starts when the New York broker takes a bill of lading from the railroad for shipment to Garfield."

4. In finding and holding that "the broker stands in the transaction not as a means of changing the nature of the transaction but as the instigator of an independent transaction."

5. In admitting and considering affidavit of David L. Gray, dated December 18, 1928, introduced at the hearing in the above-mentioned District Court.

Wherefore, said defendant and intervening defendant pray that said order and decree of December 26, 1928, be set aside and that the order of the commission as aforesaid be given full force and effect.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD W. REIDY,
Attorney for Interstate Commerce Commission.

Service of the foregoing assignment of errors and the receipt of a copy thereof are hereby acknowledged this 19th day of January, 1929.

MARION B. PIERCE,
Solicitors for Erie Railroad Company and Hoboken Manufacturers' Railroad Company.

65 In United States District Court

Præcipe for transcript of record

Filed January 21, 1929

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America, defendant, and Interstate Commerce Commission, intervening defendant, and include therein, in the order given below, the following matter, viz:

1. Order and petition and exhibits thereto attached.
2. Intervention and answer of the Interstate Commerce Commission.
3. Answer of the United States.
4. Stipulation of January 19, 1929, including narrative of testimony, together with exhibits and other documents that were submitted to the commission and introduced in the District Court, and order approving the stipulation.
5. Opinion of the District Court.

6. Final decree.
7. All docket entries in their appropriate order.
66 8. Petition for appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Notice of appeal and acknowledgement of service thereof.
12. Notice to the Attorney General of New Jersey and acknowledgement of service thereof.
13. Præcipe for record.
14. Citation on appeal.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD M. REIDY,
Attorney for Interstate Commerce Commission.

Service of the foregoing præcipe for transcript of record and the receipt of a copy thereof are hereby admitted and acknowledged this 19th day of January, 1929.

MARION B. PIERCE,
Solicitors for Erie Railroad Company and Hoboken Manufacturers' Railroad Company.

67 In United States District Court

Stipulation re transcript of record

Filed January 21, 1929

On the hearing of the application for permanent injunction the plaintiffs have offered in evidence a certified copy of the transcript of the record of that portion of the evidence and proceedings before the Interstate Commerce Commission in the proceeding entitled "Hamersley Mfg. Co. v. Erie R. R. Co. et al., Docket 16531," consisting of a total of approximately 110 pages of the oral testimony of the witnesses and 6 exhibits and the same having been received in evidence by the court; and the defendant and intervening defendant having seasonably filed and served with their notice of appeal a condensed narrative of the transcript of the evidence and proceedings for the determination of the appeal; and now for the purpose of reducing and settling the record of appeal pursuant to equity rule No. 75, the parties by their respective counsel (and with the approval of the court) stipulate:

68 (1) The within and attached narrative is a true and correct transcript in narrative form of all of the oral testimony introduced at the hearings before the commission deemed necessary for the determination of this appeal, as the same is contained in the official typewritten transcript in the proceedings referred to.

(2) The narrative shall be substituted for the original transcript of the oral testimony so certified by the commission, shall be incorporated in the record on appeal, and shall have the same force and effect upon the appeal as the original testimony.

(3) The exhibits in the certified copy of the transcript, 6 in number, shall be incorporated in the record on appeal.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD M. REIDY,
Attorney for Interstate Commerce Commission.
MARION B. PIERCE,
Solicitor for Erie Railroad et al.

JANUARY 19, 1929.

ORDER

It is ordered that the within and attached stipulation and narrative be and the same are hereby approved; and in preparing, certifying, and transmitting the transcript of the record to the Supreme Court of the United States the clerk is directed to proceed in accordance therewith.

J. L. BODINE,
United States District Judge.

69 Before Interstate Commerce Commission

Narrative statement of evidence

Filed in D. C. U. S. Jan. 21, 1929

Before Examiner Griffin

Docket No. 16531

NEW YORK, *April 21, 1925.*

Appearances: Leo C. Seff and Lewis H. Rubin, for complainant; Marion B. Pierce, for defendants.

JACOB D. GOLDBERG was thereupon called as a witness, and being first duly sworn, testified:

Direct examination:

My name is Jacob D. Goldberg, address 46 West 83rd Street, New York City, N. Y. I am connected with the Hamersley Manufacturing Company, of Garfield, N. J., as secretary, treasurer, and general manager. I have been with this concern for 25 years.

The Hamersley Manufacturing Company is engaged in the manufacturing of paper, particularly for waxing purposes. I am familiar with the allegations made in this complaint. As to the shipments

involved in this complaint which cover woodpulp in carloads moving to our plant at Garfield, N. J., the average value of this product for the year 1923, per pound, was approximately two and one-half cents. The average value for the year 1924 was two and three-eighth cents per pound. The value so far for this year has been about two and three-quarter cents per pound. The present value, however, is higher than usual.

While we received wood pulp from Hoboken, N. J., and New York lighterage, it is only within the last few years that we have received wood pulp in great quantities—that is, greater quantities than we heretofore have received it. All these shipments
70 were imported from both ports. On all these cars of wood pulp we paid all the freight charges. We did not charge back any of these freight charges to any one. We not only paid but also bore the entire freight charges on all these shipments involved. You show me some bills of lading covering some of the imported shipments through the port of Hoboken that moved from there to Garfield, and I notice they show in each instance as "ex-steamer" on the various piers in Hoboken. This situation is illustrative of all the shipments through the port of Hoboken. The shipments from New York lighterage and billed from Long Dock, N. J., were made the same way. We are still receiving shipments through the ports of Hoboken, N. J., and New York lighterage, although we have not received any shipments recently from Hoboken, N. J., most of our shipments for the last number of months having come through New York Harbor and through Long Dock, N. J. We are also still receiving shipments from Baltimore and Philadelphia. We intend continuing receiving shipments of wood pulp from the same ports, although we try to get most of our shipments from New York Harbor, but we frequently have to buy it at Philadelphia and Baltimore. We usually receive wood pulp in any kind of equipment, in closed cars. Wood pulp is generally used in the manufacture of paper products.

We always unload the cars promptly, except when the railroad bunches cars on our own sidetrack. In that case, of course, it takes us a little longer to unload a series of cars. I am now testifying covering the shipments covered by the freight bills here. We always receive wood pulp tied in bales, varying in weight from 250 pounds to 500 pounds, and either band iron or heavy rope is used in tying these bales. It is dry, but, of course, it has a moisture content
71 of approximately 10 per cent. Wood pulp is moved from New York lighterage to Piermont, N. Y. The Robert Gair Company receives wood pulp there. I know this because the same importers who ship us also ship to Robert Gair Company at Piermont, N. Y. These same importers also ship wood pulp from New York lighterage to Orangeburg, N. Y., and Hamburg, N. J.; they ship the Fibre Conduit Company at Orangeburg, N. Y., and Union Wax Paper Company, at Hamburg, N. J. This wood pulp is im-

ported from Germany, from Sweden, and from Jugo Slavia. (Tes. 6–11.)

Cross-examination:

As to why we don't have it all imported through the port of New York: That is up to the importers in the country that they bring it from, and also the steamship line and the facilities that they have after they arrive here. So I understand from the importers. We take title to this pulp when they give us the bill of lading showing it has been shipped c. i. f. dock. That means cost, including freight to the dock. This wood pulp has no technical name other than wood pulp that I ever heard of. It is what I would call a chemical wood pulp. Then there is the ground wood. That is not necessarily a domestic product; it is also imported. We do not use it. This Hamersley Manufacturing Company is a corporation under the laws of New Jersey. (Tes. 11–12.)

Redirect examination:

These shipments move as through shipments from the foreign country. We buy it c. i. f. New York, but it moves right through as an import shipment. When those ships come in, they have the billing instructions that the destination is going to be Garfield, N. J. (Tes. 12.)

LEWIS H. RUBIN was thereupon called as a witness and, being first duly sworn, testified:

72 306 carloads moved from Hoboken, N. J., which are included in the complaint as filed. Since the complaint was filed none have moved from Hoboken. (Tes. 16.)

There is no lighterage tariff at Hoboken, N. J. The steamers dock at the Hoboken pier, and it means that it is then purely a rail haul only. (Tes. 21.)

Cross-examination.

I have been with the complainant company approximately one year. I did not testify as to how long they have been importing this wood pulp; I do not know.

(Mr. Goldberg stated that they have been importing this for a good many years back; ten years or more.) (Tes. 38–39.)

C. L. CHAPMAN, general freight agent of the Erie lines east of Buffalo, was called as a witness, and testified:

I have not the exact figures as to how many cars of lumber have moved into Garfield from New York Harbor and Jersey City, yet I would like to say this: In that industrial zone bounded by the river on the east, Paterson on the west, and Hoboken on the south there have not only been hundreds but thousands of cars. We are now lightering in the neighborhood of 300 cars per month, all destined to the short haul suburban territory of which Garfield is almost the center. (Tes. 127–128.)

C. D. WARD was thereupon called as a witness and, being first duly sworn, testified:

I am assistant to the regional vice president of the Erie System. I am familiar with the handling of woodpulp, imported, going to Garfield. I prepared a statement covering 55 cars typical of the movement, taken from various piers. It shows all the information and covers the period September and October, 1924. That statement is correct.

(Statement was received in evidence as Exhibit No. 14.)

The statement covers 55 representative carloads of baled wood pulp a count of Hamersley Manufacturing Company, Garfield,
N. J., lightered from various piers located in Brooklyn and on
73 the North River during the months of September and October, 1924. (Tes. 132–133.)

After the cars are loaded they are pulled out to Croxton yard. At that point they are made up in trains and moved with other cars to Garfield and set out there, and as the plant is ready to receive them they are set in for unloading. (Tes. 137.)

I am familar with the physical layout over here at Hoboken, on the Hoboken Manufacturers' Road; I have been on the property. This traffic, wood pulp, has all got to be unloaded from the ship to a platform and be trucked onto that platform and handled off that platform into the car. It is handled from the ship onto the platform and trucked from the platform on to the car. After it is loaded into the car the Hoboken road moves it up to the interchange track with the Erie at Weehawken yard—that is, they have a switching movement there before it comes to the Erie. The Erie takes it off the interchange track and places it in a train for Croxton yard. It is moved from Weehawken to Croxton over the Weehawken Branch. (Tes. 139–140.)

Rehearing

NEW YORK, N. Y., *Nov. 8, 1927.*

Before Examiners Jewell and Prout

JACOB D. GOLDBERG was called as a witness, and testified:

Direct examination:

The complainant is a corporation. I am an officer of that corporation. I testified at the hearing in the original case on April 21, 1925. I testified that the shipments involved which moved from Hoboken, N. J., and from New York lighterage were direct imports of my company. I have been apprised of statements purported to have been made by the defendants in this proceeding, since the commission's decision, in which the defendants now contend that
the shipments from Hoboken, N. J., constitute not direct
74 imports, but intrastate traffic in New Jersey. Since receiving this advice I have made another study of the situation to

determine the correctness or incorrectness of the defendant's contention.

I am of the same mind to-day as I was on April 21, 1925, in relation to these shipments. These shipments were direct imports, whether they moved through Hoboken or through Long Dock, N. J. As to the different procedures that we would go through when we wanted to purchase wood pulp such as that involved here. The agents or brokers—I don't know what their relationship may be with their own mills—sell us this pulp for shipments from abroad from whatever country it may come, to be shipped from shipping port or shipping point to Garfield, N. J., price being given ex-dock, New York. That is the entire transaction so far as we are concerned. The price on some read c. i. f. and some read ex-dock, just according to the ——. Invariably we execute a contract with these mill agents or brokers for the purchase of these shipments of wood pulp. The contract always states that shipments are to be made from the foreign mill to us. From a financial standpoint or from the standpoint of the broker or the agent, their way of handling it is to base the price on board docks. The universal practice on wood pulp is to name the price ex-dock, New York. The contract reads shipment from abroad to us.

You only have two contracts here. The others are letters relating to contracts. Those are letters confirming contracts in relation to different shipments. The contracts are in there. There is no substantial difference in the language of the various contracts with the various mill agents or brokers; different concerns use different wordings. In its essential characteristics the language is the same.

75 I have a contract here made with J. Anderson Company, of New York, who are mill agents. The J. Anderson Company are importers of wood pulp. We make contracts with them, similar to the contracts we make with other importers and mill agents. (Tes. 155–158.)

I identify the contract you hand me made with the J. Anderson Company under date of October 6, 1924, for the shipment of 3,850 tons of No. 823 prime spring unbleached sulphite market Kronstadter, No. 1, and the contract which was executed with Ira L. Beebe & Company, dated November 16, 1922, and my company, for the shipment of 700 tons of No. 467 Konigsburg, No. 647 German Mitscherlich sulphite. (Tes. 159.) That contract mentions something in relation to the place of delivery or time of delivery. (Tes. 161.) These contracts in both cases call for shipment direct from the foreign port.

"Mr. SEFF. I assume, Mr. Examiner, that in view of the fact that this witness has testified in the original hearing as to the payment and bearing of the charges, that it will not be necessary to again go into those matters?

"Mr. PIERCE. We raise no question but what you had paid and bore the charges.

"Exam. JEWELL. With that understanding, I do not think it will be necessary." (Tes. 162.)

As to whether, when the contracts are executed with the mill agents for a certain number of tons of wood pulp, to be delivered to us at certain specified periods, they are confirmed usually by letters from the mill agent. In some instances there is correspondence back and forth in relation to them, but after the contract is signed there is nothing more to be done. Occasionally there is some further correspondence regarding it.

76 "Q. Do you order certain quantities of wood pulp which are not generally used by other paper companies? In other words, do you specify certain grades that you need?

"A. The contract calls for a specific grade only. Each contract is a contract for one particular class of pulp that we have bought from that particular concern."

These contracts are always filled with the grade that we order. When we order the grade, sometimes we know where it is going to be produced, not always, other than we know it is foreign pulp and coming from abroad. We don't always know the shipping point.

"Mr. PIERCE. We will concede that he knows it is all coming from Norway, or Sweden, or wherever it is; that it is bound to come from a foreign country; that he knows when he orders it that is where it comes from; and we will go further and concede that it does in fact come from there." (Tes. 162–163.)

Once in a great while we purchase wood pulp at either Hoboken, N. J., or at New York lighterage, either from alongside vessel or on the dock at Hoboken, knowing that it is not a part of an order for which we have contracted in advance for shipment from a foreign port. At New York or Hoboken, that would be some years not at all and other years possibly half a dozen times, either way we happen to run short of pulp and have to pick up some, or some broker has the class of pulp he wants to sell us, and we want to try a car. Those are very few. In the instances covering the shipments involved in which I have examined the freight bills, and which show the name of the steamer at Hoboken or at Long Dock, none of those instances include a case such as I have mentioned

77 where occasionally we might purchase a shipment there in an emergency; they are all excluded from these freight bills and from the records which are involved.

The bills of lading issued by the Hoboken Manufacturers' Railroad on an Erie Railroad Company's form, or rather by the Hoboken manufacturers' railroad agent, should show always in the point of origin, column first, the name of the steamship, and then the various pier numbers at Hoboken, N. J. You have the bills of lading there. The name of the steamer is specified on all of them in the point of origin column. The bill of lading reads from steamer so and so at a certain dock in Hoboken. These all read Hoboken, steamer so and so, at a certain pier, Hoboken. In other

words, the lading involved on those bills of lading are on board a vessel at Hoboken and not on a dock. The railroad company unloads from the steamer to the dock in performing its transportation service. The shipments are actually on board vessel in the Hudson or North River. (Tes. 163–166.)

Cross examination:

(A bill of lading, deemed typical of all, was received in evidence and marked "Complainants' Exhibit No. 15, Witness Goldberg.")

We contracted or purchased in advance of shipment with these mill agents for the purchase of all the wood pulp which is involved in this complaint—that is, which came through the port of Hoboken. I do not recall stating that all of these shipments were unloaded by the railroad company from the vessel; I am not in position to state who unloaded it. I don't know whether it is the railroad or the steamship line. Personally I do not know whether or not they were unloaded by the steamer onto its pier or were unloaded by the Hoboken Manufacturers' Railroad Company
78 onto its pier. If I said that they were so unloaded I misunderstood the purport of the question.

"Mr. SEFF. He merely interpreted the bill of lading. The bill of lading says steamer President Harding, or whatever the name of the steamer was, at a certain pier in Hoboken.

"The WITNESS. That is all I had in mind." (Tes. 166–68.)

The contracts that I was referring to as contracts ex-dock Hoboken or contracts New York City meant that the pulp was to be shipped from abroad, and the price was given, a price ex-dock or c. i. f. New York. That is all that we know. It did not mean that we made the contract at the dock in Hoboken or made it in New York City; it meant the delivery point to us so far as the price is concerned, but the shipment was to come to Garfield from abroad. I mean that this pulp was brought over for the Hamersley Manufacturing Company under the contract we had signed to be shipped to them. The manner of handling it was between the broker and the mill.

A direct import is a shipment from the other side to some one in America, either direct to them or through some broker who is handling it, either way. Referring to wood pulp as a direct import, I do not necessarily mean a shipment from abroad to Garfield, coming to this particular place. It is the custom in the pulp trade that foreign shipments, regardless of where the contracts are made—they may be made for shipments to Chicago, the steamers land in New York and the broker handles it for reshipment but it goes right through from the other side, to the mill, frequently without interruption. My idea of an interruption is holding it on the dock for three or four weeks. I mean interruption is any time longer than is required to get it off the steamer and forward it through. If it were unloaded from the steamer to-day, and all the equipment was available to handle it
79 to-morrow, and it was not shipped for three days afterwards, I would not necessarily say that was an interruption; depend

upon the circumstances. I know what I mean by an unnecessary interruption. The minute that car is loaded it is ready to be shipped.

"Q. Right now we have got a case where the railroad has got a car waiting for it, and the pulpwood is not offered to it for two or three days.

"A. That would not happen in our case, because they are not loaded until they get the forwarding instructions.

"Q. Now suppose the forwarding instructions are not given for two or three days?

"A. That is up to the broker."

I would say that was a direct import; I consider that a direct import. If it laid there three or four weeks, I could not answer definitely without knowing what the reasons were for it, whether it was a direct import. If the broker was sick, I do not think they would let it lay there three or four weeks. I can not answer something I am not in position to qualify as to. Our pulp comes right through. They ship it right through as fast as the railroads will load it and handle it. We do not let it lay over there on the docks at all—no more that what free time—time they give to allow it to remain on the docks. I am not familiar as to what is the free time on the steamer's dock. There must be free time on the steamer's dock. They can't take everything off immediately. I don't know what the custom is.

I do not know anything about free time; when I said free time I meant they have got to give them time to move it.

80 I said that these contracts called for shipment to us direct from a foreign port. I mean that the pulp was to be shipped from the foreign port to us at Garfield, N. J.

"Q. And if it is not shipped to you at Garfield, N. J., then it does not come within this case?

"A. I would not say so."

It might if it is shipped for the convenience or method of handling it through the broker. I can not say that the people on the other side make out their bills of lading to the Hamersley Manufacturing Company at Garfield, N. J. I can not answer that, because I do not know how they do that. The brokers on this side handle it, but when the contract is made and the pulp is shipped, it is entitled to—it is intended for the Hamersley Manufacturing Company at Garfield, to be shipped by steamer, and on arrival whoever is in charge of it has to see it goes right through to Garfield. I never inspected the method of shipping from abroad.

"Q. You do not know whether or not these packages, when shipped, if they are pulp wood such as is covered by the contracts here, are actually marked for you or not?

"A. We know that the pulp wood is marked by a number or brand, not actually marked for anybody at any time so far as my experience goes.

"Q. When is the marking that shows that it is for the Hamersley Manufacturing Company put on it, if ever?

"A. If it is ever put on, it is put on on the other side. There is nothing put on except the number or the brand or the trade mark, or whatever it may be to identify it.

"Q. That is, the trade-mark shows that it is such and such quality; is that it?

"A. Such and such quality, and such and such a number,
81 the number of bales, and the shipment shows that it is for the Hamersley Manufacturing Company."

If it is not shipped to the Hamersley Manufacturing Company from the foreign port, I do not know what the broker does here.

"Q. You do not know if he goes down and selects whatever number of bales of packages your contract calls for out of a greater number and ships it to you or not?

"A. We do know in some instances he can, if he notifies us there is a steamer on the way containing a certain number of bales of pulp for us against contract so and so; then the steamer arrives and the bales are shipped, and it must mean the entire shipment." (Tes. 168–175.)

He does not tell us it does not contain a certain number of bales for John Jones, but they often tell us the shipment consists of a thousand bales, of which 500 are for you. They do not say whether the other 500 are for somebody else or not. He often tells us our shipment is on board such and such vessel, without always specifying whether anybody else has got a shipment on there or not.

The broker or the agent of the man handling it makes the entries on the bills of lading of which the one that I just introduced is typical. We have nothing to do with it at all. We have nothing to do with it until the pulp arrives at Garfield. We neither see it or handle it or know about the steamship's arrival until the agent notifies us the steamer has arrived, and they will get the pulp through as quickly as they can—either notify us by letter or phone—and we know nothing whatever of the intermediate handling until we receive it. They also advise us that a shipment against a certain contract has left abroad. (Tes. 175–176.)

82 Redirect examination:

I do not know whether or not storage in transit is granted—that is, shipments are stored, these direct imports where we can not use the entire quantity at a certain time—they are stored until we instruct them. I would like to qualify, if I may, what I meant by that free time. Mr. Pierce, as I recall it, asked me if the pulp was not shipped immediately whether I considered that a free shipment. I meant to say that they have to be given a certain number of hours or days in which to unload and get it off. That is all I had in mind.

It is true that when we are advised by a broker that a shipment for us containing, let us say, a thousand bales, is aboard a certain steamer on its way to New York at Hoboken, due to arrive at a certain time, that the brokers have general instructions in writing

that upon the arrival of that shipment for us at Garfield—that is upon the arrival of it at the port, that it be distributed from the port over as many days as possible in order that we may be able to unload the cars with our facilities on those days. Very often in addition are given specific instructions, so that we have sometimes had 30 cars set in there in one day, and we can not unload them fast enough without incurring tremendous charges and additional expenses. We have standing instructions with these brokers or mill agents that they distribute as they arrive on these boats—stretch them out as much as they can. I presume that necessarily results in some of these cars laying in Hoboken for several days at a time. If they all came in at one time, let us say 20 cars, it would not be possible for us to handle that many cars within the regular time. We would have a good many extra days for the unloading.

When we contract for the shipment to us of imported wood
83 pulp, we do not know whether the boat on which it is going to be shipped is going to dock at Hoboken or at New York somewhere; we do not know on what boat it is going to be shipped until after it is shipped and the broker notifies us; then we don't bother with it.

In relation to that Ira L. Beebe contract or any other contracts with Ira L. Beebe & Company and shipments which were made to us in oursuance of those contracts, I am familiar with the transactions regarding those contracts in a general way. I could not say specifically, because each broker handles it in a different manner. Ira L. Beebe does not advise us upon the shipment of the pulp from the foreign port the bale numbers that are marked on the bales which are going to be delivered to our firm. (Tes. 176–178.)

(Witness excused.)

J. S. TUCKER was called as a witness, and being first duly sworn, testified:

Direct examination:

My address is 2664 Grand Concourse. I am connected with J. Anderson & Company as office manager. I am familiar with the importation of wood pulp. The J. Anderson & Company are mill agents. They represent mills manufacturing wood pulp in foreign countries; certain specified mills. We executed contracts with the Hamersley Manufacturing Company for shipment to them of the imported wood pulp, such as that which I have heard described here. I am familiar with the manner in which the wood pulp is shipped from the foreign port to the Hamersley Manufacturing Company. When the Hamersley Manufacturing Company contracts with us for the shipment of wood pulp, we send a copy of the
84 contract abroad, if that is what you mean. In the first place the Hamersley Manufacturing Company will make us an offer for a certain quantity of wood pulp, and we submit their offer by cable to the mill abroad. The mill then has to accept that by cable,

which we then confirm to the Hamersley Manufacturing Company, and the contract is made such as you have had here.

"Q. And do these cables that you have from your mills in the foreign countries and your confirmation of those cables and contracts indicate that the shipper whom you represent intends at all times, when he ships woodpulp, which is eventually used by the Hamersley Manufacturing Company, to fill an order of Hamersley which has been contracted for in advance? In other words, does the shipper there always know that the shipment he is making on any of these contracts is going to the Hamersley Manufacturing Company?

"A. Yes; he does, and his cables of shipments specify the customers for whom the pulp is intended.

"Q. You have cables?

"A. And the quantities; yes.

"Q. Showing the shipment aboard a certain steamer of certain lots of wood pulp?

"A. That is correct." (Tes. 178–180.)

The cables indicate what tonnage is going to Hamersley, and what tonnage might go to other customers. That tonnage always goes to Hamersley which is on board this vessel when it leaves the foreign port—that is, the tonnage specified in the cable, to fill the Hamersley order. I have never known of a case of Hamersley shipments being diverted to anybody else or a portion of the shipments.

85 "Q. Now then when the shipment arrives on board that steamer, and the steamer docks in New York Harbor, either at Hoboken, or at any other point in the harbor, do you go through about the same procedure in giving forwarding instructions to the rail carriers?

"A. The customers all alike buy on dock, or ex-dock, port of arrival. We receive cable advices from abroad specifying the shipments and quantities. We in turn notify the customers the name of the steamer and the quantities.

"Q. That is while in transit?

"A. While in transit, and the expected date of arrival. Upon arrival of the steamer, I personally or somebody in the office staff make out the inland bill of lading and give the instructions to the carriers.

"Q. For the forwarding of the shipments from alongside the vessel?

"A. From dock or alongside the vessel, over the side of the vessel if the customer wants it that way, but always on dock unless he specifies over the side of the steamer." (Tes. 181–182.)

I understand that in some cases where they load it over the side of the steamer on a lighter—you see the customer buys it on dock, New York. He has to pay the freight charges from the port of arrival to his factory or mill, and he can save freight charges by some-

times sending it the entire distance by boat instead of by rail. In other words, these terms on dock or alongside vessel are merely to indicate from what point the consumer is going to bear the freight and other transportation charges. In our case—I don't know how it is about other importers—in our case all the mills we represent insist on selling on dock, port of arrival. They will not
86 give terms over the side of the steamer on to lighter. (Tes. 182.)

Cross-examination:

Taking the instance such as I have referred to where there are a lot of wood pulp coming over on a given vessel, some for Hamersley and some for somebody else, the bills of lading are made out to us. We often have offers that Hamersley makes—they place with you to purchase. We often combine those in one cable, but always specify the amount for each customer—that is, each customer offers to buy so much. We never sell to anybody any of this wood pulp while it is en route—that is, after it leaves. We never make a contract with any purchaser to cover stuff which is in transit; we are mill agents on commission. The orders are obtained from the customers before they are sent to the mills abroad. (Tes. 182–183.)

Redirect examination.

It is true that our issuing instructions to the carrier when the shipments arrive at the port to forward the shipment on to Hamersley at Garfield is due to the fact that we have all of the shipping documents and do all of the necessary work in connection with the importation of these shipments.

As to whether these shipments could be handled any differently than they are, under the terms of purchase; the customer could order the shipments out himself, but we do it as a matter of courtesy. As to whether that would place the burden upon the customer then of taking care of all the necessary documents and other matters which are peculiar to the importation of freight: It is pretty hard to answer the question yes or no, because the bills of lading are made out to us. We would have to endorse them over to the customer, you see, and in some instances, if you allow me to explain this, there are half a dozen customers on one invoice from the mill abroad,
87 while the bill of lading would only specify the full quantity on the ship, and then, of course, one customer could not very easily handle it. We would have to give instructions to the steamship company to make delivery of certain quantities to different carriers. In other words, when the shipments leave the foreign port they are pooled to one consignee, and we are the consignee. We act as the distributer for the shipper to the various customers; that is right, exactly. Of the various lots which are on that steamer for those customers, when I say that we pay for the pulp when it leaves the foreign port; that is done for the convenience of the customer.

LEWIS H. RUBIN was thereupon called as a witness, and, being first duly sworn, testified:

Direct examination:

My name is Lewis H. Rubin; address 150 Nassau Street, New York. I testified in the original proceeding in this case.

The movement from Hoboken is 125 cars a year and has been for the last four and one-half years. There may be an interruption there of a month or two, but throughout the year it will move at 125 cars. That is due to the fact that more or less Garfield, which is the Hamersley Company, has no control as to where the ship will dock, and that is the reason for the various breaks. (Tes. 192.)

I might make a statement as regards the movement before I offer these exhibits. During the four and one-half year period ending June 30, 1927, an average of 248 cars per year was shipped by way of Long Dock—that is, from New York Harbor, a total of 1,118 cars—while 561 cars were imported through Hoboken, N. J., at 125 cars per year approximate average, total 1,679 cars were imported through both ports, and on an average 373 cars per year. (Tes. 192.)

88 In my investigation of the shipments over this four and one-half year period I found that in eight out of every ten cases when a steamer arrived with freight to be lightered in New York Harbor to Garfield it contained for the Hamersley Company three or more cars of woodpulp which could have been lightered at one time, and that in two out of every three cases it contained five cars or more. As far as the steamers were concerned, the percentage of single car lots is a little over one per cent of the movement. The number of times that the Erie Railroad had to send a lighter up to pick up one car of woodpulp represents about eight times out of a hundred. As a matter of fact, the average shows that there were 6.4 cars handled for each steamer entering New York Harbor on shipments for Garfield. Every time a lighter went to a vessel for Hamersley woodpulp there were almost six and one-half cars of woodpulp which would represent about 325,000 pounds. In two out of every three cases where the Erie Railroad lighters went to the side of that vessel they had at least five or more cars. Almost 300,000 pounds every time they went. (Tes. 192–195.)

There is no lighterage whatever involved on the shipments which come to the complainant through Hoboken, N. J. That is purely a rail haul. (Tes. 208.)

GEORGE H. HOBBS was thereupon called as a witness, and, being first duly sworn, testified:

Direct examination:

I am secretary and treasurer of the Hoboken Manufacturers Railroad, also act in the capacity of freight agent. I have been freight agent 28 years January 1st. I am familiar with the method in which the Hoboken Manufacturers handles woodpulp going to Garfield.

"Mr. SEFF. Is that from an operating standpoint; are you asking that question now?

89 "Mr. PIERCE. Yes, sir. The bills of lading, one of which is typical of all, has been presented in evidence here, and shows on its face ex-such as such a steamship.

"Mr. SEFF. I beg your pardon. They do not show ex-steamship. They show as point of origin steamship so and so, at a certain pier at Hoboken. They don't have the word "ex" on them whatever.

"Q. (By Mr. Pierce.) Assume I am right and that that was the way—and that they show the steamship, do you know why that is done?

"A. Merely to designate where the goods are to be obtained so far as we are concerned."

The bill of lading is compiled by the broker himself, you know. As a railroad agent we pay little or no attention to that, whether it was ex or from, or the steamship, other than a dock order. The shipper or broker furnish us a dock order.

The broker furnishes us a dock order, and it reads, Please deliver to the Erie Railroad, or Hoboken Manufacturers Railroad, so and so, 50 bales of woodpulp, ex-steamship so and so. He puts ex-steamship so and so on that order, so the steamship people will be able to designate what lot it is.

The Hoboken Manufacturers Railroad does not unload this woodpulp from the steamer; the steamship people themselves discharge it on the pier. When we get an order such as I have described, we of course get the shipping instructions with that order as to where to forward the goods. We present that order at the steamship pier to the delivering clerk of the steamship line, who delivers the goods to us. Then we take them from the tier on a pile on the dock and place them on to the cars and forward them. These goods are not unloaded on the pier or dock of our railroad from the steamer;

90 they are unloaded from the steamship, which they call discharge from the steamer, to the steamship pier. We sign bills of lading or issue bills of lading for these shipments when we receive these orders and obtain physical possession of the property. Naturally they read from what we call it, the steamship line. We pay no attention to the steamer, but the delivering clerk of the steamship line does. The station they read from is Hoboken, N. J. Our goods never go to the Erie station or pier. We load them direct on to the car and card the car direct to destination. Our road does not operate over the Erie R ilroad, but we card the cars through. After the orders are loaded and carded, we place them on interchange or on float bridge, whichever way they go, for the railroad to take; that is, for our connecting railroad to take. We never receive from these shippers in New York orders to the effect that such and such a steamer en route was due on or about such and such a date, contains so and so, get this property and forward it to the Hamersley Manufacturing Company at Garfield. We never get the orders until the property is on the steamship piers; the broker gets his arrival notice

from the steamship company first. I have been there for 28 years. As to whether I know from my work as freight agent of the Hoboken Manufacturers Railroad whether or not shipments of wood pulp, after being unloaded from the steamer, lie there for several days on the steamship company's pier before we are given orders to take them into our possession and forward them to Garfield as the carrier: It is very customary for goods to lie there several days. It takes the steamship that long to discharge, and sometimes the goods lie there for weeks. Shippers sometimes tell us to forward two cars a day out of a 5,000 lot may be. If we do that, then we do not take the stuff from the steamship pier in excess of the two cars a day; I leave
91 it right on the steamship pier, and give my bill of lading when I get the property, the day of forwarding, when we load. (Tes. 234–239.)

Cross-examination:

I testified that I have been with my company for 28 years. As to whose shipments of wood pulp I am referring to specifically when I say that these shipments of wood pulp lay on the piers: There are only four or five different people that ship wood pulp that we know of. As to whether I made any investigation to determine whether Hamersley shipments that are involved here, laid on those piers, and how many days they laid there: The North German Lloyd Steamship Line, to my knowledge, has got a small pier in Hoboken, and instead of unloading this on the pier they unloaded it on to rented lighters, unload this pulp onto the lighter, and hold it alongside the ship. When the ship went they brought the lighter into the pier, and unloaded it, probably there for two weeks. It was on the lighter of the steamship company for two weeks, because they didn't have pier room for it. Right at the pier, in New York Harbor; I have known that to occur. I did not many any investigation at all in regard to this particular consignee so as to know whether Hamersley wood pulp which is involved here, moving through the Hoboken gateway, laid on the piers that length of time, such as I specify, weeks, and how many instances of that kind there were. I am speaking of wood pulp shipments generally. It would apply to the Hamersley Company, as well as others, because their pulp goes through.

"Q. But you do not know, do you, whether any of the particular shipments which are here involved for Hamersley constituted those shipments which you observed, which were on these piers for two or three weeks?

"A. I would say I was not given a list.

92 "Mr. PIERCE. Just a second; Hamersley shipments have not been identified yet, except shipments which moved over a period of several years.

"The WITNESS. I was going to say I have not been given a list in order to testify definitely in connection with one particular shipment." (Tes. 239–240.)

I do know the facts, particularly in connection with Hamersley shipments which are involved, because their shipments are handled the same way as everyone else's. It takes a ship three or four or five days to discharge, and the pulp is most always there several days or so. When I spoke about weeks, it happens but seldom that a shipment stays there two or three weeks for Hamersley. The steamship people wont allow it to lay there very long. They put it in a public warehouse. If they are good customers, they let them lay there for days, and I have known them to lay there for quite a long time, week or 10 days. Now if a shipment comes in 5,000 bales and we get orders to forward three cars a day, why, it is going to be there a week or 10 days. I cannot say that I have ever seen any Hamersley shipments lying on those piers for a week or two weeks, but I have seen wood pulp, and it might as well be his as anyone else's.

Certainly there is imported freight traffic handled through our line at Hoboken for the Erie Railroad. The arrangements as to other import freight are similar to the handling of wood pulp, as far as our handling is concerned; we handle wood pulp the same as every other commodity—makes no difference to us. Assuming that the Hammersley Company ordered a shipment of wood pulp from Germany, shipped direct to them, without the intervention of a broker, and they had their own representative here to go to the
93 United States customs and clear the various papers necessary, it depends as to whether our services and our handling would be identical in such cases at Hoboken as in this particular case. The shipments in order to go through should be handled on a through bill of lading. I mean that a through foreign bill of lading should be issued to show the destination as Garfield. I never saw any bills of lading like that for wood pulp. I have seen it for other commodities to a destination in trunk line territory. We are handling shipments from Japan that way.

"Q. Where do you get your orders for the distribution—for the disposition of that material? How do you get and how do you handle an order? Suppose the ship came in, let us say, with a cargo of tea, to be sonsigned to, let us say, the Jewel Tea Company's plant on your line. That is a through imported shipment, let us say, for a tea company on your line. What are you supplied with when that shipment arrives—when that steamer arrives at the Hoboken docks?

"A. We are supplied with a bill of lading and a shipping order, also a dock order made out against the steamship company for them to deliver us the goods.

"Q. And you always have the steamship bill of lading?

"A. Not steamship bill of lading."

We do not know anything about the steamship bill of lading. The shipment has arrived in Hoboken, and we get an order to get it from the Holland-American Line, we will say. The broker issues

that order, or it might be the owner of the goods. We don't know anything about it being a through shipment. We never know it; the goods are there. If they were handled on a through bill of lading, things would be different. There are no such through shipments that I know of made from Germany to Garfield.

94 "Q. I say, let us take another commodity; let us take tea or any other imported commodity which moves; where the shipper bills it direct to Garfield on the other side, on a steamship bill of lading, do you get only a dock order in such cases plus a bill of lading that you issue?

"A. I can not recollect any shipment that we ever handled that way."

I said it should be if you were talking about a through shipment. If you want to ship a through shipment from Germany to Garfield, you would have to handle it on a through bill of lading. On a through steamship bill of lading it might be issued by a railroad in Europe.

"Q. Did you ever handle one through the port of Hoboken? Were you ever furnished with a steamship or a foreign railroad bill of lading at Hoboken, or were you always furnished in all cases with a shipping order and dock certificate? Does not that constitute what you get in all cases?

"A. A shipping order and a dock order, an order for us to get the goods to the steamship.

"Q. In all cases, regardless of what kind of merchandise it is, is that true?

"A. That is right." (Tes. 241–245.)

"Q. Then, according to your theory, there could be no through import shipments of any commodity through the port of Hoboken if they required that your company get a through bill of lading, because you just testified that in all cases you get only a dock certificate or a dock order plus the shipping order portion of the bill of lading which you issue. Now, you would not know, then, would you, whether any of these shipments were through shipments, or whether they were shipments handled like this wood pulp was handled?

95 "A. I would know very well if a man came in and asked me for a bill of lading on a shipment; I would know that he was handling it locally, and that the shipment was starting from there."

We would not always issue a bill of lading at Hoboken for the transportation, not if there is a through bill of lading issued; it would not be necessary. We never let a shipment go forward from Hoboken which we received from the steamship to any interior point without the issuance of a bill of lading by the Hoboken Manufacturers Railroad.

"Exam. JEWELL. May I ask a question there? As I understand it, you were drawing a distinction between the goods that are sent into Hoboken here and which you subsequently bill out and shipments which you say would be through shipments if they traveled on a through bill of lading, and did you say that you had ever re-

ceived a shipment traveling in the latter way on a through bill of lading?

"The WITNESS. No, sir."

That is in 28 years. All of our shipments in my opinion have been local shipments from Hoboken. I am not acquainted with the rates applying from the steamship piers to destination; they are published by the trunk-line carriers. I do not think on the bill of lading it shows what rates are to be charged, unless it is inserted by the shipper, and then these brokers are all very accustomed to the rates. They know what they are, you know. We do not know what kind of rates are assessed on these shipments that we handle, whether import rates or domestic rates. All we put on the railroad's billing instructions is "import," you know, so that the biller can bill it. We do not do the revenue billing at our station. We insert the word
96 "import" on the shipping order on all shipments that we receive from off piers. We make a notation "import," or ex-steamship so and so, and of course that means the same thing. The object in putting that on the billing is so that the billing clerk if he chooses, he can bill the import rate if it should apply, and if not—we generally tell—we just merely tell him where the shipment comes from for his information. (Tes. 246–7.)

The allowance we get from the Erie for the service which our railroad performs on this wood pulp from 1926 back, was $1.01, and it is now $1.35. The $1.35 is made retroactive to January 1, 1927. That increase was allowed in settlement of a proceeding involving divisions pending before the Interstate Commerce Commission. (Tes. 247.)

(Witness excused.)

O. M. MEYNE was thereupon called as a witness, and, being first duly sworn, testified as follows:

Direction examination:

I am assistant general freight agent of the Erie Railroad System. (Tes. 250.)

I have had a statement complied concerning the movement on wood pulp from Hoboken to Garfield, and this statement shows the movement during the month of August, 1927.

(The statement was received in evidence as Exhibit No. 36.)

To the best of my knowledge this shows all of the shipments which moved during August. (Tes. 255–258.)

I have stated that with few exceptions the rates from Hoboken Manufacturers Railroad points and from New York are the same.
The reasons for the present disparities are shown in Exhibit
97 38. In all other cases the rates are on a parity, that is, from Hoboken Manufacturers Railroad versus New York and Brooklyn stations. As to why they are on a parity: As to freight handled by the Hoboken Shore Railroad, the freight is loaded by that line. It is loaded into the car—on freight handled

by the Hoboken Shore Railroad and received from vessels docking adjacent thereto. From the vessel's piers or docks the Hoboken Shore is asked to dray from those piers or docks to the car and thence load it into cars. Freight arriving in Hoboken, especially via steamers having berths along the Hoboken Shore Railroad, that freight is also costly to lines other than the Hoboken Shore. I mean by that that if the North German Lloyd steamer tied up at its pier, some railroad would have access to that steamer. That order is placed with the D. L. & W. to handle a certain amount of freight to a point on its line or its connection. The Lackawanna would order a lighter alongside the vessel and receive it from tackle of vessel, and the Lackawanna would apply its New York Harbor rate, and for that reason it is necessary for the Hoboken Shore to receive the present allowance, and also apply the New York Harbor rate. (Tes. 264–265.)

Cross-examination:

If the carriers are to load the freight in the cars on the docks at Hoboken, the New York Harbor rate is to apply. I believe it is shown somewhere in here.

Everything that I have testified to here in relation to how shipments are handled at either Hoboken or any other point, or as to what movements existed, is based on information given to me by the operating department of the Erie Railroad. We come in close contact with them. I got this traffic from the accounting department's actual records as to actual movements. We got the
98 records for four months. Took those months at random. In other words, we felt that the last four months was representative for any period. We did not ask them to give us the records covering these particular commodities. We could have shown considerable more commodities. They gave us all the commodities moving to these destinations. The list is not a complete one. (Tes. 274–278.)

As to the wood pulp that is involved here—that is, delivered to the Hoboken manufacturers at Hoboken—none of it is lightered. The delivery is made to the Erie Railroad at Weehawken, N. J. The bill of lading is made out at Hoboken by the Manufacturers Railroad. As to how the wood pulp is delivered from the vessel to the Hoboken Manufacturers Railroad, it is unloaded from the vessel to the dock, according to the information I received. The ship is at the dock. Those vessels have berths adjacent to the Hoboken shore at Hoboken, N. J. (Tes. 299–300.)

(Witness excused.)

99 *Complainant's Exhibit No. 2*

Docket No. 16531.

[Witness, L. H. Rubin]

A comparison of rates and earnings on shipments of wood pulp carloads from N. Y. lighterage and Hoboken, N. J., to Garfield, N. J. (which are under attack), with rates and earnings between other points in the same territory

From—	To—	Short Line mileages	Rate in effect in cents per 100 lbs.	6th-class rate	Percentage relationship of rate in effect to 6th-class rate	Earnings per ton mile under rate in effect in mills
Hoboken, N. J	Garfield, N. J	15	*11.5	11.5	100%	153
N. Y. lighterage	" "	20	*12.5	12.5	100%	125
Weehawken, N. J	Orangeburg, N. Y	24	9	10	90%	75
" "	Piermont, N. Y	24	9	9.5	95%	75
" "	Salisbury Mills, N. Y	65	11.5	12.5	92%	36
" "	Water Gap, Pa	98	10	14.5	70%	21
Jersey City	Orangeburg, N. Y	25	9	10	90%	72
" "	Piermont, N. Y	25	9	9.5	95%	72
" "	Salisbury Mills, N. Y	63	9.5	12.5	76%	30
" "	Water Gap, Pa	96	10	14.5	70%	20
N. Y. lighterage	Piermont, N. Y	30	10	16	63%	67
" "	Hamburg, N. J	66	15.5	24	65%	47
" "	Orangeburg, N. Y	27	10	12.5	80%	74
Brooklyn, N. Y	Orangeburg, N. Y	27	10	12.5	80%	74
Hoboken, N. J	Delaware, N. J	79	11.5	16	72%	29
" "	Portland, Pa	82	11.5	16	72%	28
" "	Water Gap, Pa	82	11.5	17.5	66%	28

NOTE.—*Rates in effect marked "*" are those under attack and are the full 6th-class rates.
Tariff authorities: Erie R. R., I. C. C. 17451, 16990, 17250; N. Y. Central, I. C. C. 15049; D. L. & W., I. C. C. 20850.
Mileage shown from Official Railway Guide.

100 *Complainant's Exhibit No. 3*

Docket No. 16531.

[Witness, L. H. Rubin]

A comparison of rates and earnings on shipments of wood-pulp carloads from New York lighterage, N. Y., and Hoboken, N. J., to Garfield, N. J. (which are under attack), with rates and earnings on other articles between the same and other near-by points

Commodity	From—	To—	Short-line mileages	Rate in effect in cts. per 100 lbs.	6th-class rate	Percentage relationship of rate in effect to 6th-class rate	Earnings per ton-mile under rate in effect in mills
Wood-pulp	N. Y. lighterage	Garfield, N. J	20	12.5	12.5	100%	125
"	Hoboken, N. J	"	15	11.5	11.5	100%	153
Wood-pulp board	N. Y. lighterage	"	20	11.5	12.5	90%	115
Bldg. paper	"	"	20	11.5	12.5	90%	115
Roofing paper	"	"	20	11.5	12.5	90%	115
Wood-pulp board	Hoboken, N. J	"	15	10.5	11.5	90%	140
Bldg. paper	"	"	15	10.5	11.5	90%	140
Roofing paper	"	"	15	10.5	11.5	90%	140
Wrapping paper	"	Piermont, N. Y.	24	12.5	16	78%	104
Waste paper	N. Y. lighterage	"	30	12.5	16	78%	83

Tariff authorities: Erie, I. C. C. 16990; Erie, I. C. C. 17451; Erie, I. C. C. 17323.
Mileages taken from Official Railway Guide.

101 *Complainant's Exhibit No. 15*

THE ERIE RAILROAD CO.

(Uniform domestic straight bill of lading, adopted by carriers in official, southern and western classification territories, March 15 1922)

UNIFORM STRAIGHT BILL OF LADING

(Prescribed by the Interstate Commerce Commission)

ORIGINAL—NOT NEGOTIABLE

Received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading, from steamer " Pres. Harding," Pier 3, Hoboken, N. J., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to The Hammersley Mfg. Co.

Destination, Garfield, State of N. J.

No. packages	Description of articles, special marks and exceptions	*Weight (subject to correction)	Class or rate	Check column
	Erie	87,483£	125	Bales.
	L. & N	8,585£	125	"
250	Bales woodpulp. Marked: B B.			
	[467]			
	C			

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.) ——— (Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be prepaid."
Received $——— to apply in prepayment of the charges on the property described hereon.
Invoice approved Feb. 1, 1924. Per ———. (The signature here acknowledges only the amount prepaid.)

IRA L. BEEBE & Co., *Shipper.*
Per S. M.

102 CONTRACT TERMS AND CONDITIONS

SEC. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its

agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

SEC. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed: Provided, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

SEC. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk of compressing the same for greater conven-

ience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse, or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property,

such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under the section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

SEC. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery, without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not

those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection, with this bill of lading.

SEC. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage, or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery, or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent

or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignee and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

SEC. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Indorsed:) Received December 19, 1923.

103 *Exhibit No. 36*

[Witness, Mr. Meyne]

I. C. C. Docket No. 16531

HAMERSLEY MFG. COMPANY VS. ERIE RAILROAD CO. ET AL.

Statement covering movement of wood pulp, carloads, Hoboken, N. J., to Garfield, N. J., during August, 1927, also revenue per car accruing to Hoboken Manufacturers' R. R. and Erie Railroad

Waybill	Date	Weight	Rate per 100 lbs.	Proportion accruing to—		Total revenue per car
				Hoboken Mfrs. R. R.	Erie R. R.*	
302	8-11-27	58880	11½	$30.74	$27.97	$[illegible]
308	8-11-27	58880	11½	30.74	27.97	[illegible]
304	8-11-27	55680	11½	37.58	26.45	[illegible]
305	8-13-27	54220	11½	36.60	25.73	[illegible]
306	8-13-27	61420	11½	41.46	29.17	[illegible]
419	8-15-27	51220	11½	34.58	24.80	[illegible]
Average per car		56873		38.39	27.02	[illegible]

* Based on an allowance of $1.35 per net ton (Erie R. R., I. C. C. 17722) account freight loaded into car by Hoboken Manufacturers' R. R., balance of 9½ per net ton accrues to Erie Railroad from Weehawken to Garfield, 13 miles

104 *Exhibit*

Order No. 914.

J. Andersen & Co., 21 East 40th Street, New York

CONTRACT FOR WOOD PULP

NEW YORK, *October 6th, 1924.*

HAMERSLEY MFG. CO., *Garfield, N. J.*:

We have this day sold to you for account of ourselves and on the following terms and conditions all of which are made a part of this contract as follows:

Quantity and description of goods: Three thousand eight hundred and fifty (3850) tons #823 prime strong unbleached sulphite (Kronstadter #1).

Mode and place of delivery: Ex-dock New York.

Time of delivery: For shipment from abroad at the rate of 350 tons per month from February to December, 1925, inclusive.

Price: 2¾¢ per lb., air dry weight; exclusive of duty if any; wrappings around the pulp to be charged for the same as the contents thereof, to cover the tonnage for shipment from abroad during February, March, April, and May, 1925; remainder subject mutually satisfactory price adjustment about May 1st for shipments from abroad during June, July, and August and about July 1st for September, October, November, and December, 1925.

Terms of payment: Net cash thirty days from date of invoice. Payment to be made in New York funds or its equivalent.

Remarks: Subject to conditions printed on back hereof.

Accepted:

THE HAMERSLEY MFG. CO.
J. D. GALDBERG.

J. ANDERSEN & CO.,
By J. F. SWANSON,
Mgr. of Sales.

105 CONDITIONS

1. Weight: In all instances where the word "tons" occurs in this contract it is understood to refer to gross tons of 2,240 lbs. air-dry weight.

2. Moisture: All pulp to be billed on air-dry weight, and the term "air-dry" shall mean 90% absolutely dry pulp and 10% of atmospheric moisture.

3. Tests: In case of disputes arising regarding the air-dry contents of the pulp, same to be re-tested at port of arrival, or at the mill of the consumer, by a recognized chemist of good standing according to the custom of the trade, and his report is to be final and

to be made the basis of settlement. If the difference does not exceed one per cent, the invoice shall stand as rendered. The re-test to be made in the following manner:

Not less than half the parcel in dispute shall be available; otherwise no claim is permissible. Not less than ten per cent of the entire shipment in dispute, nor less than six bales to be sampled, and samples to be drawn only from bales in good condition, and the accurate weight of all bales tested to be ascertained by sworn weigher before sampling. The cost of the test to be paid by the party in error. If the invoice rendered by the seller is based upon the weight and test certificate of a recognized weigher and chemist at an American port, any re-test shall be made jointly by the said chemist and buyer, or his representative.

4. Disputes: All other disputes than weight and test arising under this contract shall be settled by arbitration, and said arbitration to be conducted and enforced according to the laws of the State of New York governing arbitrations of commercial disputes.

(a) Seller and buyer shall each appoint an arbitrator well acquainted with the pulp business, and these arbitrators shall appoint a third arbitrator. The concurrence of any two of the arbitrators shall be sufficient to settle any question or make any decision. The place of arbitration shall be in the city of New York unless the majority of the arbitrators shall decide otherwise. The arbitrators may assess compensation for their services, at their discretion.

(b) Should either party fail to appoint an arbitrator within ten days after notice in writing or by telegraph requiring him to do so, the party not in default shall have the right either to abandon the arbitration provisions of this contract, or to apply to the secretary of the American Paper & Pulp Association at his office in New York City for the designation of some person to act as arbitrator and the secretary for the time being of the American Paper & Pulp Association is hereby appointed as the agent of the parties to make such designation in case of the default of either; and a designation so made by the said secretary shall be as effective as if made directly by the party failing to appoint his arbitrator. The two arbitrators thus named shall appoint a third arbitrator. The concurrence of any two of such arbitrators shall be sufficient to settle any question or make any decision. Both parties agree that a designation so made as aforesaid shall be effective and binding and a decision made by such arbitrators shall be sufficient and conclusive.

(c) Any party to this contract may seek the aid of the courts in any jurisdiction if the adverse party should fail to comply with the award made by the arbitrators.

(d) If a buyer makes complaint or any claim, he agrees without prejudice to his rights to unload promptly and store properly any goods which have arrived at or may be in transit from the port of shipment to his mill.

5. Each shipment under this contract to be considered as a separate contract and default on one or more shipments not to invalidate the rest of the contract.

6. This contract is based upon the rate of duty existing at the time of signing same, and in case of any change the buyer to have the benefit of any reduction made or to pay any increase.

7. Force majeure: The buyer or seller may suspend deliveries under this contract pending any contingencies beyond their control, which prevent or hinder the manufacture of paper or delivery of pulp, viz, act of God, war, strikes, lockouts, drought, flood, accidents, total or partial fire, obstruction of navigation by ice at port of shipment, and loss or detention at sea, bankruptcy or any other contingency beyond the control of either party. Shipments in transit must be accepted by the buyer.

The seller or buyer, as the case may be, shall give prompt notice to the other party of the cause and commencement of such suspension, and also when it ceases to have effect, and deliveries shall be resumed as soon as practicable thereafter; but deliveries omitted during the period of suspension are to be considered as cancelled and not to be tendered after the expiration of the contract time, unless otherwise mutually agreed.

8. Time limit: All claims of whatever nature must be made in writing within fifteen days after the delivery of the shipment at the consumer's mill, wharf, or station, and no claims made after that period shall be recognized.

9. Breach of contract: Pulp not taken during the currency of this contract as herein specified cannot be afterward claimed, but may be sold for buyer's account by the seller. On the other hand, failure of the seller to make delivery entitles the buyer after due notice to purchase against the seller for his account except as otherwise provided for in this contract.

10. Default or bankruptcy: If the buyer make default in any payment on this or any other contract between the parties hereto, or becomes subject to the bankruptcy laws, the seller may, at his option, cancel further deliveries, but the buyer shall remain liable to the seller for all loss and damage sustained by reason of such default. If the credit of the buyer shall at any time in the judgment of the seller become impaired, the seller shall have the right to require payment in advance.

11. War risk: If on account of a state of war in any country, shipments must be insured against the risks of war, the cost of such insurance shall be borne by the buyers.

Exhibit

106 Order No. 6189.

Ira L. Beebe & Co., Vanderbuilt Building, 132 Nassau Street, New York

CONTRACT FOR WOOD PULP

[Adopted by the Association of American Wood Pulp Importers]

NEW YORK, *January 16, 1922.*

HAMERSLEY MFG. CO., *25 Park Place, N. Y.*

We have this day sold to you 700 tons on the following terms and conditions, all of which are made a part of this contract, as follows:
Quantity and description of goods: 700 tons #467 Konigsberg #467 German mitscherlich sulphite.
Mode and place of delivery: Ex-dock, N. Y.
Time of delivery:
350 tons for February/March shipment from Konigsberg.
350 " " March/April " " "
Price: At 2.88 cents per lb. ex-dock, N. Y., "exclusive of duty."
Terms of payment: Trade acceptance—30–60 and 90 days. Interest to be added after 60 days.
Remarks: Subject to conditions printed on back hereof.
Accepted:
THE HAMERSLEY MFG. CO.
J. D. GOLDBERG, *V. P.*

IRA L. BEEBE & CO
J.

107 CONDITIONS

1. Weight: In all instances where the word "tons" occurs in this contract it is understood to refer to gross tons of 2,240 lbs. air-dry weight.

2. Moisture: All pulp to be billed on air-dry weight, and the term "air dry" shall mean 90% absolutely dry pulp and 10% of atmospheric moisture.

3. Tests: In case of disputes arising regarding the air-dry contents of the pulp, same to be retested at port of arrival or at the mill of the consumer by a recognized chemist of good standing according to the custom of the trade, and his report is to be final and to be made the basis of settlement. If the difference does not exceed one per cent, the invoice shall stand as rendered. The retest to be made in the follow manner:

Not less than half the parcel in dispute shall be available; otherwise no claim is permissible. Not less than five per cent of the entire shipment in dispute, nor less than six bales to be sampled, and samples

to be drawn only from bales in good condition, and the accurate weight of all bales tested to be ascertained by sworn weigher before sampling. The cost of the test to be paid by the party in error.

4. Disputes: All disputes as to quality or delivery regarding this contract (with the exception of moisture, which is provided for under clauses 2 and 3), shall be settled by arbitration in the following manner:

Each party to appoint an arbitrator who shall be well acquainted with the pulp business and they to appoint their umpire before proceeding with the hearing. If either party fail to appoint their arbitrator within fifteen days of notice in writing requiring him to do so, the arbitrator appointed by the other party shall act for both; his decision to be binding upon both parties as if he had been appointed by consent. It shall be left to the arbitrators in case they agree that the pulp is not of the quality sold within reasonable limits, to decide whether or not the pulp shall be rejected or taken with an adequate allowance.

Furthermore, it shall be left to the arbitrators to agree upon the place of arbitration.

5. Each shipment under this contract to be considered as a separate contract and default on one or more shipments not to invalidate the rest of the contract.

6. This contract is based upon the dutiable status of the merchandise sold existing at the time of signing same, and in case of any change, the buyer is to have the benefit of any reduction made or to pay any increase.

7. Force majeure: The buyer or seller may suspend deliveries under this contract pending any contingencies beyond their control, which prevent or hinder the manufacture of paper or delivery of pulp, viz, act of God, war, strikes, lockouts, drought, flood, accidents, total or partial fire, obstruction of navigation by ice at port of shipment, and loss or detention at sea, bankruptcy, or any other contingency beyond the control of either party. Shipments in transit must be accepted by the buyer.

The seller, or buyer, as the case may be, shall give prompt notice to the other party of the cause and commencement of such suspension, and also when it ceases to have effect, and deliveries shall be resumed as soon as practicable thereafter; but deliveries omitted during the period of suspension are to be considered as cancelled and not to be tendered after the expiration of the contract time, unless otherwise mutually agreed.

8. Time limit: All claims of whatever nature must be made in writing within fifteen days after the delivery of the shipment at the consumer's mill, wharf, or station, and no claims made after that period shall be recognized.

9. Breach of contract: Pulp not taken during the currency of this contract as herein specified can not be afterward claimed, but may be sold for buyer's account by the seller. On the other hand, failure of

the seller to make delivery entitles the buyer after due notice to purchase against the seller for his account except as otherwise provided for in this contract.

10. Default or bankruptcy: If the buyer make default in any payment on this or any other contract between the parties hereto, or become subject to the bankruptcy laws, seller may at his option cancel further deliveries, but the buyer shall remain liable to the seller for all loss and damage sustained by reason of such default. If the credit of the buyer shall at any time in the judgment of the seller become impaired, the seller shall have the right to require payment in advance.

108 Before Interstate Commerce Commission

Secretary's certificate

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Complaint filed December 4, 1924;

Amendment to complaint filed April 22, 1926;

Order of the commission entered April 24, 1926, permitting same;

Answers of defendants, pages 6 to 13, 16, 21, 38, 39, 55, 56, 109, 110, 111, 112, 113, 119, 120, 127, 128, 132 to 143, and 145 to 148, of the transcript of the stenographer's notes of the hearing held at New York, N. Y., April 21, 1925, before Examiner C. W. Griffin, and of Exhibits 2 and 3 filed at said hearing, in Case No. 16531, Hamersley Manufacturing Company v. Erie Railroad Company et al., and

Report and order filed and entered May 7, 1927;

Erie Railroad Company's petition for rehearing and modification of decision and order in part filed June 13, 1927;

Order of the commission, entered June 18, 1927;

Petition on behalf of Hamersley Manufacturing Company and Clifton Paper Mills for reconsideration and modification of the commission's report and order dated May 7, 1927, and for reargument before the full commission filed June 25, 1927;

Order of the commission entered October 3, 1927, pages 155 to 189, 192, 193, 194, 195, 202, 204, 205, 208, I, 234 to 258, 264, 265, 274 to 279, 299, and 300 of the transcript of the stenographer's

109 notes of the hearing held November 8, 1927, at New York, N. Y., before Examiners B. Jewell and L. L. Prout, and of Exhibits 15 and 36 filed at said hearing and of two contracts filed pursuant to request made at the hearing; and

Report and order filed an entered November 2, 1928, in Cases Nos. 16531, Hamersley Manufacturing Company v. Erie Railroad Company et al., and 17326, Clifton Paper Mills v. New York, Susquehanna & Western Railroad Company et al., the originals of which are now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 17th day of December, A. D. 1928.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

110 Before Interstate Commerce Commission

THE HAMERSLEY MANUFACTURING CO., COMPLAINANT,

vs.

ERIE RAILROAD COMPANY, READING COMPANY, THE BALTIMORE AND OHIO Railroad Company, the Central Railroad Company of New Jersey, the Lehigh and Hudson River Railway Company, Hoboken Manufacturers' Railroad Company, defendants.

Complaint

To the honorable Interstate Commerce Commission:

The complaint of the above-named complainant respectfully shows:

I

That the complainant, Hamersley Manufacturing Company, is a corporation existing under the laws of the State of New Jersey, with its chief office and mill located at Garfield, N. J., and is engaged in the manufacture and sale of grease-proof tissue, parchment, and waxed wrapping papers.

II

That the defendants above named are common carriers engaged in the transportation of property by railroad between points in the States of Maryland, Pennsylvania, and the State of New Jersey, and as such common carriers are subject to the provisions of the interstate commerce act.

III

That the shipments involved herein consisted of woodpulp
111 in rolls and in bales carloads, imported from foreign countries through the ports of New York, N. Y., Philadelphia, Pa., Hoboken, N. J., and Baltimore, Md., and transshipped by rail from Long Dock, N. J., Hoboken, N. J., Philadelphia, Pa., and Baltimore, Md., to Garfield, N. J.

Fourteen (14) carloads moved from Philadelphia, Pa., to Garfield, N. J., during period between June and September 1924, both inclusive, via Reading Company, C. R. R. of N. J., and Erie Railroad.

Twenty-eight (28) carloads moved from Locust Point (Baltimore), Md., to Garfield, N. J., during period between November, 1922, and August, 1924, both inclusive, via B. & O. R. R., Reading Co., L. and H. R. Ry., and Erie R. R.

Three hundred and six (306) carloads moved from Hoboken, N. J., to Garfield, N. J., between period January, 1923, and August, 1924, both inclusive, via Hoboken Manufacturers R. R. and Erie R. R.

Three hundred and sixteen (316) carloads moved from Long Dock, N. J. (New York, N. Y., lighterage station), to Garfield, N. J., between period January, 1923, and September, 1924, both inclusive, via Erie R. R.

That the shipments referred to above moving from Hoboken, N. J., and Long Dock, N. J., were part of through transportation being imported via vessel and lightered from side of vessel to Long Dock, N. J., and unloaded from vessel at Hoboken, N. J.

Since the latter part of 1924 (at which time this complaint was being prepared) many additional cars of woodpulp have moved and are continuing to move from the same points of origin to Garfield, N. J., via the same routes, and complainant desires to include such shipments as well as future shipments between those points in this complaint.

IV

That charges for the rail transportation from the ports mentioned in Paragraph III hereof for the shipments of woodpulp involved were assessed by defendant carriers on the following basis:

From Philadelphia, Pa	18½¢ per 100 lbs.
From Baltimore, Md	22½¢ per 100 lbs.
From Hoboken, N. J	11½¢ per 100 lbs.
From Long Dock, N. J	12½¢ per 100 lbs.

112

V

That the rates and charges for the transportation involved herein were increased since January 1, 1910.

VI

That the rates assessed by defendant carriers as outlined in Paragraph IV hereof were and are unjust and unreasonable in violation of Section I of the interstate commerce act to the extent they exceeded and exceed the following rates:

From	Philadelphia, Pa	16.5¢ per 100 lbs.
"	Baltimore, Md	20.5¢ " " "
"	Hoboken, N. J	9¢ " " "
"	Long Dock, N. J	10¢ " " "

Since rates were and are in effect on like traffic to and from adjacent points via defendant carriers and within the same territory generally which were and are comparable with the basis of rates shown above.

VII

By reason of the facts stated in the foregoing paragraphs, complainant has been subjected to the payment of charges for transportation which were and are unjust and unreasonable in violation of

Section I of the interstate commerce act. Wherefore complainant prays the defendants may be severally required to answer the charges herein, that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said act, and to make reparation for the unreasonable charges hereinbefore alleged on all shipments moving between January, 1923, and September, 1924, both inclusive, from and to points as indicated in Paragraph III hereof to the basis of rates as indicated in Paragraph VI hereof, or such other sum as the commission shall determine that complainant is entitled to, as an award of damages under the provisions of the act hereinbefore referred to and that such other further order or orders may be made as the commission may consider proper in the premises.

Respectfully submitted.

THE HAMERSLEY MANUFACTURING CO.,
Complainant,

(Signed) LEWIS H. RUBIN, *Counsel*,
P. O. address, 150 Nassau St., New York, N. Y.

Dated at New York, N. Y., Dec. 3, 1924.

113 Before Interstate Commerce Commission

[Title omitted.]

Motion for leave to amend complaint

To the honorable Interstate Commerce Commission:

Comes now the complainant in the above-named proceeding and prays that the complaint as originally submitted be amended by substituting, in lieu of the text contained in Paragraph VII hereof, the following:

VII

By reason of the facts stated in the foregoing paragraphs, complainant has been subjected to the payment of charges for transportation, which were and are unjust and unreasonable in violation of section 1 of the interstate commerce act. Wherefore complainant prays the defandants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said act and to make reparation for the unreasonable charges hereinbefore alleged on all shipments
114 moving subsequent to January, 1923, which have already moved, and which may move during the pendency of this proceeding, from and to the points as indicated in Paragraph III hereof, to the basis of rates as indicated in Paragraph VI hereof, or such other sum as the commission shall determine that complainant is entitled to, as an award of damages under the provisions of the act hereinbefore referred to and that such other further order

or orders may be made as the commission may consider proper in the premises.

Respectfully submitted.

THE HAMERSLEY MANUFACTURING CO.,
Complainant,

(Signed) LEWIS H. RUBIN, *Counsel*,
P. O. address, 150 Nassau St., New York, N. Y.

Dated at New York, N. Y., March 25, 1926.

115 Before Interstate Commerce Commission.

[Title omitted.]

Order permitting amendment to complaint

April 24, 1926

Upon consideration of the record in the above-entitled proceeding and application filed on behalf of complainant,

It is ordered that the complaint in this proceeding be, and the same is hereby, amended in accordance with the document hereto attached, marked "Amendment to complaint";

It is further ordered that a copy of the amendment be served upon defendants, and that a copy of this order be served upon each of the parties to this case.

By the commission.

[SAL.] GEORGE B. MCGINTY, *Secretary*.

120 Before Interstate Commerce Commission

[Title omitted.]

Answer of Erie R. R. Co.

Erie Railroad Company, party respondent, for its answer to the complaint in the above entitled proceeding, respectfully states:

1. That it believes to be true the allegations contained in Paragraph I.

2. It admits that it is a common carrier engaged in the interstate transportation of property by railroad between points in the States of Maryland, Pennsylvania, and the State of New Jersey.

3. It denies that its rates are unjust and unreasonable in violation of Section I of the interstate commerce act.

Wherefore, respondent, Erie Railroad Company, prays that the complaint be dismissed.

ERIE RAILROAD COMPANY,
By (Signed) T. C. POWELL,
Vice President,

Dated, New York, January 21, 1925.

M. B. PIERCE,
Attorney for Respondent, Erie Railroad Company, 50 Church St., New York City.

122 Before Interstate Commerce Commission, Division 3

[Title omitted.]

Order postponing order of May 7, 1927; June 18, 1927

Upon further consideration of the records in the above-entitled proceedings, and good cause appearing therefor:

It is ordered that the order entered in these proceedings on May 7, 1927, in so far as it requires defendants therein to establish for the future a rate of 10.5 cents per 100 pounds on wood pulp, in carloads, from Hoboken, N. J., to Garfield, N. J., be, and it is hereby, postponed indefinitely.

By the commission, division 3.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

123 Before Interstate Commerce Commission

[Title omitted.]

Order reopening proceedings, Oct. 3, 1927

Upon further consideration of the records in the above-entitled proceedings, and of complainants' petition for reconsideration, modification of the report, and reargument and petition of defendant Erie Railroad Company for rehearing and modification of the report and order in part:

It is ordered that these proceedings be, and they are hereby, reopened for further hearing, at such time and place as the commission may hereafter direct, in respect of the rates from New York, N. Y., and Hoboken, N. J., to Garfield and Passaic-Dundee, N. J.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

124 In United States District Court

ERIE RAILROAD COMPANY ET AL., PETITIONERS

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

Affidavit of David L. Gray

Filed Dec. 26, 1928

STATE OF NEW YORK,

County of New York, ss:

David L. Gray, to me known, being duly sworn, deposes and says that for many years he was employed in the traffic department of the Erie Railroad Company, a petitioner herein, as assistant general freight agent, assistant freight traffic manager, and assistant general

traffic manager, and that he is now and for some years past has been vice president in charge of traffic of said company; that in the course of his official duties he has become and is familiar with the traffic of the said Erie Railroad Company and is familiar with the traffic involved in this proceeding; that during the period from the early part of 1923 to January 1, 1928, there were transported by Erie Railroad Company and Hoboken Manufacturers' Railroad Company approximately 900 cars of woodpulp from Hoboken, N. J. to Garfield, N. J., consigned to the Hamersley Manufacturing Company, on which traffic the sixth-class rate of 11.5¢ per 100 pounds was by them assessed and collected; that since January 1, 1928, 180 cars of wood pulp have been transported by said railroads from Hoboken, N. J., to Garfield, N. J., on which the sixth-class rate of 12.5¢ was assessed and collected by them; that on the approximately 900 cars which were transported during the period January, 1923, to January 1, 1928, the Interstate Commerce Commission in its report and order here under consideration, has awarded reparation to the basis of a rate of 10¢ per 100 pounds; that this award, based on an average weight of approximately 52,400 pounds, averages $7.86 per car and amounts to the sum of $7,074; that on the 180 cars transported so far during the year 1928 the Interstate Commerce Commission in the same decision and order has awarded reparation to the basis of 10¢ per 100 pounds, which on the same approximate average weight will average $13.10 per car, amounting to $2,358; that the total amount of reparation on the shipments which have so far moved from Hoboken to Garfield is $9,432 on which interest at the rate of 6% is to be
125 paid under the commission's decision herein; that investigation has been made which shows that there is and is to be expected a further and continuing movement of such traffic as is involved in this proceeding and that the Hamersley Manufacturing Company has so stated and has so informed representatives of the Erie Railroad Company.

The rate on wood pulp from Hoboken to Garfield has been published at various times in Erie Railroad Company tariffs, I. C. C. 16990, 17451, 17323, and 17250, which tariffs are of general application and include rates applying to interstate movements as well as rates applying to intrastate movements within the States of New Jersey, New York, and Pennsylvania, for illustration, the interstate and intrastate rates being published in the same tariff for reasons of convenience and economy; that if your petitioners are compelled to publish the 10¢ rate from Hoboken to Garfield provided for in the commission's order here under consideration they can not collect more than said rate, and if said order should be held to be invalid he is informed and believes they will never be able to enforce collection of the difference between said rate of 10¢ and the present rate of 12.5¢.

DAVID L. GRAY.

Subscribed and sworn to before me this 18th day of December, 1928.

[L. S.]

A. L. TRAVIS,
A Foreign Commissioner of Deeds for New Jersey and New York.

(Indorsed:) Citation in usual form showing service on Marion B. Pierce, filed Jan. 21, 1929, omitted in printing.

(Indorsed:) Clerk's certificate to foregoing transcript omitted in printing.

129 In United States District Court

[Title omitted.]

Docket entries

Dec. 17, 1928.	Petition filed.
" " "	Order to show cause why interlocutory injunction should not issue filed.
" 19, "	Intervention of Interstate Commerce Commission filed.
" " "	Answer of Interstate Commerce Commission filed.
" " "	Answer of United States filed.
" " "	Hearing on order to show cause why interlocutory injunction should not issue. Decision reserved. (Judge Bodine.)
" " "	Certificate of secretary of Interstate Commerce Commission and attachments thereto filed.
" 26, "	Final decree for injunction only filed.
" " "	Memorandum filed. (Judge Bodine.)
" " "	Affidavit of David L. Gray filed.
Jan. 21, 1929.	Assignment of errors filed. (U. S. Supreme Court.)
" " "	Notice of appeal filed (2).
" " "	Petition for appeal by United States and Interstate Commerce Commission filed.
" " "	Order allowing appeal filed.
" " "	Præcipe for transcript of record filed.
" " "	Stipulation re transcript of record and transcript attached filed.
" " "	Citation issued.

130 In Supreme Court of the United States

Statements of points to be relied upon on behalf of United States and Interstate Commerce Commission and designation of parts of record to be printed

Filed Feb. 7, 1929

United States of America and Interstate Commerce Commission will rely on the following points in brief and in oral argument on

the hearing of the appeal for the reversal of the decree of the District Court:

1. The order of the commission entered November 2, in Docket No. 16531, Hamersley Manufacturing Co. v. Erie R. R. Co. et al. 148 I. C. C. 47, was within the jurisdiction of the commission.

2. The holding of the District Court that "the essential character of the transaction is in intrastate and not interstate commerce" was contrary to the facts and erroneous in law.

3. The holding of the District Court that "a new movement starts when the New York broker takes a bill of lading from the rail-
131 road for shipment to Garfield" was contrary to the facts and erroneous in law.

4. The holding of the District Court that "the broker stands in the transaction not as a means of changing the nature of the transaction but as the instigator of an independent transaction" was erroneous.

5. The order was within the power of the commission. The decree should be reversed and the cause remanded to the District Court with directions to dismiss the bill of complaint for want of equity and at the cost of the plaintiffs.

February 4th, 1929.

WILLIAM D. MITCHELL,
Solicitor General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD M. REIDY,
Solicitor for Interstate Commerce Commission.

Receipt of copy of the above set out "Statement of points on behalf of United States and Interstate Commerce Commission" acknowledged this 6 day of February, 1929.

MARION B. PIERCE,
Solicitor for Erie R. R. Co. and Hoboken Mfrs. R. R. Co..

(File indorsement omitted.)

132 *Designation of the parts of the record which shall be printed*

United States of America and Interstate Commerce Commission, by their respective counsel, hereby designate the entire record for printing as necessary for consideration for the determination of the points filed, except (a) such omissions as the clerk shall make pursuant to paragraph (9) of rule 13 and except so much and such parts thereof as are designated below which shall not be printed or otherwise reproduced by the clerk:

1. Answer of Reading Company to complaint of Hamersley Mfg. Co. before Interstate Commerce Commission, Docket 16531, page 116, of the typewritten transcript of the record.

2. Answer of Central R. R. Co. of New Jersey to complaint of Hamersley Mfg. Co. before Interstate Commerce Commission,

Docket 16531, pages 117–119, inclusive, of the typewritten transcript of the record.

133 3. Answer of Baltimore & Ohio R. R. Co. to complaint of Hamersley Mfg. Co. before Interstate Commerce Commission, Docket 16531, page 121, of the typewritten transcript of the record.

February 4th, 1929.

WILLIAM D. MITCHELL,
Solicitor General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
EDWARD M. REIDY,
Solicitor for Interstate Commerce Commission.

Receipt of copy of the above set-out "Designation by appellants of the parts of the record which shall be printed" acknowledged this 6th day of February, 1929.

MARION B. PIERCE,
Solicitor for Erie R. R. Co. and Hoboken Mfrs. R. R. Co.

(Indorsed:) File No. 33,972. New jersey D. C. Z. S. Term No. 663. The United States of America and Interstate Commerce Commission, appellants, vs. Erie Railroad Company and Hoboken Manufacturers' Railroad Company. Filed January 29th 1929. File No. 33,972.

Office Supreme Court,
FILED
FEB 12 192
CHARLES ELMORE C

FILE COPY

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1928

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT ON JURISDICTION

U.S. GOVERNMENT PRINTING OFFICE : 1929

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 663

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT ON JURISDICTION

A. STATUTES

Section 238 of the Judicial Code as amended by Act of February 13, 1925 (c. 229, 43 Stat. 936, 938), paragraph (4) (U. S. C. Title 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 219, 220; U. S. C. Title 28, Sec. 47).

B. DECREE

The final decree was entered December 26, 1928. (R. 54.)[1]

[1]All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

The application for appeal was filed and the order allowing the appeal was entered January 21, 1929. (R. 56–58.) Notices of appeal with service acknowledged were also filed January 21, 1929. (R. 59–60.) The case was docketed in this Court on January 29, 1929.

C. RULINGS

The suit (R. 4–13) was brought to enjoin the enforcement of the order of the Commission (R. 14–22) entered November 2, 1928, in the proceedings entitled "*Hamersley Manufacturing Company* v. *Erie Railroad Company et al.,*" Docket 16531, 148 I. C. C. 47. The order directed respondent carriers to establish, maintain, and apply on or before January 10, 1929, in the manner indicated in the report, to the transportation of imported wood pulp, in carloads, from Hoboken, N. J., to Garfield, N. J., a rate which shall not exceed 10 cents per 100 pounds.

The specially-constituted District Court wrote an opinion (R. 48–53) holding and adjudging that the order was beyond the power of the Commission and void, on the ground that the transportation by railroad was intrastate commerce. The final decree (R. 54–55) permanently enjoins enforcement of the order.

D. CASES

Baltimore & Ohio Railroad Company v. *United States,* 277 U. S. 291.

Assigned Car Cases, 274 U. S. 564.

United States v. *New York Central Railroad Co.*, 272 U. S. 457.

Brimstone Railroad Company v. *United States*, 276 U. S. 104.

Western Paper Makers' Chemical Company v. *United States*, 271 U. S. 268.

WILLIAM D. MITCHELL,
Solicitor General.

EDWARD M. REIDY,
Solicitor for Interstate Commerce Commission.

FEBRUARY, 1929.

○

FILE COPY

Office Supreme Court, U.
FILED
OCT 9 1929
CHARLES ELMORE CROP
CLER

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

E. M. REIDY,
For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

SEPTEMBER, 1929.

INDEX

	Page
OPINIONS	1
JURISDICTION	2
QUESTION	2
THE STATUTE	2–3
STATEMENT	3–5
(a) Proceedings before the Commission	3–4
(b) Proceedings in the Lower Court	4–5
ASSIGNMENT OF ERRORS	5–6
SUMMARY OF ARGUMENT	6–7
CHRONOLOGICAL STATEMENT	7–9
ARGUMENT	9–45
(a) The interstate and foreign journey started when the wood pulp left the foreign mills and the continuity of that journey was not broken by the interruption at Hoboken	9–38
(b) The interruption at Hoboken was solely such as occurs generally in the case of import traffic coming in by vessel and moving out by rail, and was merely for separation and assortment for the convenience of shipment to its destination	38–45

71080—29——1

CASES CITED

American Steel & Wire Co. v. *Speed*, 192 U. S. 500 41
Atchison, Topeka & Santa Fe Ry. Co. v. *Harold*, 241 U. S. 371 .. 28
Atlantic Coast Line R. R. Co. v. *Standard Oil Co.*, 275 U. S. 257 .. 23, 43
Baltimore & Ohio Southwestern R. R. Co. v. *Settle*, 260 U. S. 166 .. 6, 10, 28
Carson Petroleum Co. v. *Vial et al.*, 279 U. S. 95 ..... 28, 29
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366 ..... 6, 7, 40
Chicago, Milwaukee & St. Paul Ry. Co. v. *Iowa*, 233 U. S. 334 .. 23
Coe v. *Errol*, 116 U. S. 517 27
Erie Railroad Co. et al. v. *United States*, 32 F. (2d) 613 1
Express Publishing Co. v. *G. H. & S. A. Ry. Co.*, 85 I. C. C. 203 .. 28
Goldsboro Chamber of Commerce Case, 91 I. C. C. 315 28
Hamersley Manufacturing Co. v. *Erie Railroad Co. et al.*, 126 I. C. C. 491; 148 I. C. C. 47 1
Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469 ..... 6, 7, 28
Louisiana v. *Texas & Pacific Ry. Co.*, 229 U. S. 336 22
Ohio Railroad Commission v. *Worthington*, 225 U. S. 101 ..... 28, 41
Pennsylvania R. R. Co. v. *Clark Coal Co.*, 238 U. S. 456 ..... 9, 35
Philadelphia & Reading Railway Co. v. *Hancock*, 253 U. S. 284 .. 6
Public Utilities Commission v. *Landon*, 249 U. S. 263 38
Railroad Commission of Louisiana v. *Texas & Pacific Ry. Co.*, 229 U. S. 336 ..... 6, 34
Railroad Commission of Ohio v. *Worthington*, 225 U. S. 101 .... 6, 7
Sabine Tram Case, 227 U. S. 111 ..... 6, 7, 22, 28, 32, 34
Savage v. *Jones*, 225 U. S. 501 39
So. Covington Railway v. *Covington*, 235 U. S. 537 9
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498 ..... 6, 25, 28
Spaulding & Bros. v. *Edwards*, 262 U. S. 66 34
Stafford v. *Wallace*, 258 U. S. 495 42
State v. *Engle*, 34 N. J. L. 425 ..... 7, 40
Swift & Co. v. *United States*, 196 U. S. 375 ..... 6, 7, 34, 40
Texas & New Orleans R. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111 .. 6, 7, 22, 28, 32, 34

STATUTES CITED

Interstate Commerce Act, sec. 1 2-3
Urgent Deficiencies Act (U. S. C., Title 28, sec. 47) 2

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 30

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, appellants,

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

OPINIONS

The specially constituted District Court (Circuit Judge Davis and District Judges Rellstab and Bodine) filed its written opinion on December 26, 1928 (R. 26–29) which is reported in 32 F. (2d) 613, under the title: *Erie Railroad Co. et al.* v. *United States.*

The reports of the Interstate Commerce Commission, hereinafter called the Commission, appear as Docket No. 16331, *The Hamersley Manufacturing Company* v. *Erie Railroad Company et al.*, 126 I. C. C. 491; (R. 14–20) (May 7, 1927) 148 I. C. C. 47; (November 2, 1928). (R. 7–13.)

JURISDICTION

The suit was commenced on December 17, 1928, under the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219; U. S. C., Title 28, Sec. 47), to annul and set aside a certain order of the Commission, dated November 2, 1928, requiring the establishment of a rate of 10 cents per 100 pounds on imported wood pulp, in carloads, from Hoboken, N. J., to Garfield, N. J. (R. 14.)

The final decree, setting aside, annulling and suspending the said order of the Commission, was entered December 26, 1928. (R. 30.) The appeal was allowed on January 19, 1929. (R. 31–32.)

Pursuant to rule 12 of this Court, appellants on February 11, 1929, submitted a statement as to jurisdiction, and on April 8, 1929, the court found that probable jurisdiction had been shown.

QUESTION

The sole question is, does the Commission have jurisdiction to fix the all-rail rate on certain shipments of wood pulp moving from Hoboken, N. J., to Garfield, N. J., a distance of about 15 miles (R. 16), the pulp having been imported through the port of Hoboken and subsequently moving to the Hamersley Manufacturing Company at Garfield?

The level of the rate prescribed by the Commission is not involved.

THE STATUTE

Section 1 of the Interstate Commerce Act provides:

That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

* * * * *

from one State or Territory of the United States, * * * to any other state or territory of the United States, * * * or from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.

(2) The provisions of this Act * * * shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; * * *.

STATEMENT

PROCEEDINGS BEFORE THE COMMISSION

By complaint filed December 4, 1924, subsequently amended, the Hamersley Manufacturing Company, engaged in the manufacture of paper at Garfield, N. J., alleged that the rates charged on imported wood pulp, in carloads, shipped between November, 1922, and September, 1924, and moving from foreign countries through the port of Hobo-

ken and transshipped by rail from Hoboken to Garfield, were and are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and prayed for reparation. (R. 69–72.) Rates from other ports, outside the State of New Jersey, to Garfield, were also attacked (R. 69–72), but need not be discussed here.

After extended proceedings before the Commission, including two hearings and two oral arguments, the Commission, on November 2, 1928, issued its report and order (R. 7–14), in which it found that: The shipments of imported wood pulp from Hoboken to Garfield, N. J., were subject to its jurisdiction (R. 9); that the rate was unreasonable to the extent it exceeded 10 cents per 100 pounds; and the Commission required the carriers to establish on or before January 10, 1929, on not less than 5 days' notice, a rate of 10 cents per 100 pounds on imported wood pulp, in carloads, from Hoboken to Garfield, N. J. (R. 14).

PROCEEDINGS IN THE LOWER COURT

On December 17, 1928, petition for injunction was filed (R. 2), and prayed that the order of "November 2, 1928, be declared null and void and be set aside, annulled, and suspended, and its enforcement, execution and operation be forever enjoined," and for "such other and further relief as may be proper in the premises" (R. 7).

The answer of the United States was filed on December 19, 1928 (R. 24), and on the same day

the Commission intervened (R. 21) and filed an answer (R. 22). In its petition below the carrier contended that the order of the Commission was invalid and should be set aside for the reason that:

> B. Said Order is made applicable to traffic and transportation over which the Interstate Commerce Commission has no jurisdiction and said order is not an order which the Commission is empowered to make by the provisions of the Interstate Commerce Act or by the provisions of any other Statute. (R. 4.)

After argument the District Court, on final hearing, rendered an opinion (R. 26–29) finding that the commerce involved was intrastate in character (R. 29), and stating its view that there were two independent transactions, one from the foreign point of origin to Hoboken and the other from Hoboken to Garfield (R. 29). The court granted a permanent injunction, annulling and setting aside the order (R. 30) prescribing a rate from Hoboken to Garfield. On January 18, 1929, appeal to this court was allowed. (R. 31.)

ASSIGNMENT OF ERRORS

While separate errors are assigned to certain holdings or the use of certain specific language of the District Court in its opinion (R. 33–34) the assignment of errors and the points relied upon, for the purpose of this argument, may be summarized under the general error of the District Court

in holding that the commerce involved was intrastate in character (R. 33).

SUMMARY OF ARGUMENT

(a) *The Interstate and Foreign Journey Started When the Wood Pulp Left the Foreign Mills and the Continuity of That Journey Was Not Broken by the Interruption at Hoboken.*

Swift & Company v. *United States*, 196 U. S. 375.

Southern Pacific Terminal Company v. *Interstate Commerce Commission, et al.*, 219 U. S. 498.

Railroad Commission of Ohio v. *Worthington, Receiver of the Wheeling & Lake Erie R. R. Co.*, 225 U. S. 101.

Texas & New Orleans R. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111.

Railroad Commission of Louisiana v. *Texas & Pacific Ry. Co.*, 229 U. S. 336.

Philadelphia & Reading Ry. Co. v. *Hancock*, 253 U. S. 284.

Baltimore & Ohio Southwestern R. R. Co. v. *Settle, et al.*, 260 U. S. 166.

Champlain Realty Company v. *Brattleboro*, 260 U. S. 366.

Hughes Brothers Timber Co. v. *Minnesota*, 272 U. S. 469.

(b) *The Interruption at Hoboken Was Solely Such as Occurs in the Case of All Import Traffic Coming in By Vessel and Moving Out by Rail, and*

Was Merely for Separation and Assortment for the Convenience of Shipment to Its Destination.

State v. *Engle,* 34 N. J. L. 425.

Champlain Realty Company v. *Brattleboro,* 260 U. S. 366.

Hughes Bros. Timber Co. v. *Minnesota,* 272 U. S. 469.

Railroad Commission of Ohio v. *Worthington,* 225 U. S. 101.

Texas & New Orleans Railroad Company v. *Sabine Tram Co.,* 227 U. S. 111.

Swift & Company v. *United States,* 196 U. S. 375.

CHRONOLOGICAL STATEMENT

A. The Hamersley Manufacturing Co., Garfield, N. J., makes an offer to a New York broker, or mill agent (R. 45) to buy certain quantities of wood pulp (R. 46).

B. The mill agent or broker submits this offer by cable to the mill abroad. (R. 46.)

C. The foreign mill accepts the offer by cable, which information the New York broker confirms to the Hamersley Company.

D. A contract is then entered into by the New York broker and the Hamersley Company calling for shipment from abroad, (mill or point of origin not named) of certain quantities of a described wood pulp, to be distributed over a period named in the contract, place of delivery to be "Ex-dock New York." (R. 63.)

71080—29——2

E. The foreign mill ships the quantities ordered by the Hamersley Company—the bales destined for it may be a part only of a larger cargo—but the quantities ordered are always delivered to the Hamersley Company at Garfield. The bales are marked abroad with a brand, but are not so marked as to show the individual customer.

F. The foreign mill cables the New York broker showing the shipment aboard a certain steamer and specifying the customers. The tonnage intended for the Hamersley Company always goes to it. (R. 46.)

G. The New York broker pays for the pulp when it leaves the foreign port; this is done for the convenience of the customer (the Hamersley Company). (R. 47.)

H. On arrival of vessel at Hoboken, the mill agent or New York broker furnishes the Hoboken Manufacturers' Railroad a dock order (R. 49) and a bill of lading showing the receipt by the railroad company from the vessel of a certain quantity of wood pulp, destined to the Hamersley Company at Garfield. (R. 56.)

I. On certain shipments there may be some delay in forwarding by the railroad to Garfield, because of an arrangement between the broker and the Hamersley Company under which the pulp is shipped in lots of 2 or 3 cars to prevent congestion at Garfield. (R. 9.)

J. The New York broker never diverts shipments intended for the Hamersley Company to another customer. (R. 46.)

K. This constitutes a continuing purpose, and as a matter of fact the actual course of business by which Hamersley's shipments move from the foreign port to Garfield.

ARGUMENT

(a) The Interstate and Foreign Journey started When the Wood Pulp Left the Foreign Mills and the Continuity of That Journey was Not Broken by the Interruption at Hoboken

In *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, at pages 465–6, the court said:

> In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and the provisions of the Act to Regulate Commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply.

In *So. Covington Ry.* v. *Covington*, 235 U. S. 537, at page 545, is the following language:

> This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is

> really and in fact between States, the mere arrangements of billing or plurality of carriers do not enter into the conclusion.

In *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, the court stated:

> * * * And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. * * * (Id. 170.)

With the above principles in mind we will now discuss the evidence in this case together with the findings of the Commission thereon. The Hamersley Manufacturing Company operates a parchment and waxed wrapping manufacturing plant at Garfield, N. J. (R. 15), a local point on the Erie Railroad about 15 miles distant from Hoboken, N. J. (R. 16). In its business the Hamersley Company uses large quantities of wood pulp, and this wood pulp is imported from Europe (R. 15) through Hoboken and other ports. In this suit only the shipments moving through Hoboken are involved. During the period involved in the complaint (November, 1922–September, 1924) and up to the time of the hearing, 306 carloads of imported wood pulp moved from Hoboken to Garfield. (R. 15–16.)

In its report the Commission first stated that to determine the question of whether the movement from Hoboken to Garfield was subject to its jurisdiction, it was necessary to understand the manner of conducting the business. (R. 8.) The Commission then stated:

> Complainant makes an offer to a broker in New York for a certain quantity of wood pulp. The latter cables the offer to a foreign mill and, if accepted by the latter, complainant is so advised. (R. 8.)

It appears that the broker in New York City through which the Hamersley Company transacts much of its business for this foreign wood pulp is the J. Anderson Company, and that the contracts entered into by and between the Hamersley Company and the J. Anderson Company are similar to contracts made "with other importers and mill agents." (R. 40.) The Anderson Company's connection with the transaction is stated by its Office Manager, Mr. J. S. Tucker, who, at the hearing before the Commission, said:

> * * * I am familiar with the importation of wood pulp. The J. Anderson Company are mill agents. They represent mills manufacturing wood pulp in foreign countries; certain specified mills. We executed contracts with the Hamersley Manufacturing Company for shipment to them of the imported wood pulp, such as that which I have described here. I am familiar with the manner in which the wood pulp is shipped

from the foreign port to the Hamersley Manufacturing Company. When the Hamersley Manufacturing Company contracts with us for the shipment of wood pulp, we send a copy of the contract abroad, if that is what you mean. In the first place the Hamersley Manufacturing Company will make us an offer for a certain quantity of wood pulp, and we submit their offer by cable to the mill abroad. The mill then has to accept that by cable, which we then confirm to the Hamersley Manufacturing Company, and the contract is made such as you have had here. (R. 45–6.)

* * * We often have offers that Hamersley makes—they place with you to purchase. We often combine those in one cable, but always specify the amount for each customer—that is, each customer offers to buy so much. We never sell to anybody any of this wood pulp while it is en route—that is, after it leaves. We never make a contract with any purchaser to cover stuff which is in transit; we are mill agents on commission. The orders are obtained from the customers before they are sent to the mills abroad. (R. 47.)

The Commission then said:

A contract is then made between complainant and the broker calling for a certain quantity of wood pulp to be delivered with [in] a specified time on dock at New York Harbor. (R. 8.)

To suport this we invite attention again to Mr. Tucker's testimony, together with copies of two contracts (unnumbered exhibits). (R. 65; 66.) The testimony of Mr. Tucker is:

> * * * The mill then has to accept that [offer of Hamersley] by cable, which we then confirm to the Hamersley Manufacturing Company, and the contract is then made such as you have had here. (R. 45–6.)

The following testimony then occurs:

> * * * "does the shipper there" [in the foreign country] "always know that the shipment he is making on any of these contracts is going to the Hamersley Manufacturing Company?
>
> "A. Yes; he does, and his cables of shipments specify the customers for whom the pulp is intended.
>
> "Q. You have cables?
>
> "A. And the quantities; yes.
>
> "Q. Showing the shipment aboard a certain steamer of certain lots of wood pulp?
>
> "A. That is correct." (R. 46.)
>
> * * * We never sell to anybody any of this wood pulp while it is en route—that is, after it leaves. We never make a contract with any purchaser to cover stuff which is in transit; we are mill agents on commission. The orders are obtained from the customers before they are sent to the mills abroad. (R. 47.)

Mr. Goldberg, General Manager of the Hamersley Company, testified:

> * * * Invariably we execute a contract with these mill agents or brokers for the purchase of these shipments of wood pulp. The contract always states that shipments are to be made from the foreign mill to us. From a financial standpoint or from the standpoint of the broker or the agent, their way of handling it is to base the price on board docks. The universal practice on wood pulp is to name the price ex-dock, New York. The contract reads shipment from abroad to us. (R. 40.)
>
> * * * There is no substantial difference in the language of the various contracts with the various mill agents or brokers; * * * (R. 40.)

There is reproduced in this record (R. 63; 66) copies of two original contracts for the purchase of wood pulp, the mode and place of delivery being shown "Ex-dock New York," (R. 63; 66) said contracts being executed by the Hamersley Company with the brokers or agents, the contracts being accepted by the Hamersley Company on the one hand and by the broker or agent on the other. These contracts specifically show the Hamersley Company contracted for the purchase of specified quantities of wood pulp long in advance of shipment; one contract covering wood pulp to be delivered February to December, 1925, inclusive, being dated October 6, 1924 (R. 63), and the other,

covering February-April (1922), being dated January 16, 1922 (R. 66). The place of delivery of the shipments was to be "Ex-dock New York." (R. 63.) That the shipments were to be made from foreign mills abroad is evidenced by the words in the Anderson contract "for shipment from abroad at the rate of 350 tons per month from February to December, 1925, inclusive," (R. 63), and in the Beebe Contract "shipment from Konigsberg" (R. 66).

Mr. Goldberg further testified:

> * * * Each contract is a contract for one particular class of pulp that we have bought from that particular concern.
>
> These contracts are always filled with the grade that we order. When we order the grade, sometimes we know where it is going to be produced, not always, other than we know it is foreign pulp and coming from abroad. We don't always know the shipping point. (R. 41.)
>
> "MR. PIERCE [Counsel for carrier]. We will concede that he knows it is all coming from Norway or Sweden, or wherever it is; that it is bound to come from a foreign country; that he knows when he orders it that is where it comes from; and we will go further and concede that it does in fact come from there." (R. 41.)

Continuing the Commission found:

> Complainant thus knows the grade or quality of the wood pulp to be supplied, but does

> not know the name of the foreign mill. The contract calls for delivery "on" or "ex" dock at New York and the price paid by complainant is based on delivery there. This is for the purpose of determining what portion of the total transportation charges is to be borne by each party. (R. 8.)

To substantiate this, we refer the court to the contracts before mentioned. (R. 63; 66.)

These contracts show under "Quantity and Description of Goods": Three thousand eight hundred and fifty (3850) tons #823 prime, strong unbleached sulphite (Kronstadter #1) (R. 63) and 700 tons #467 Konigsberg #467 German Mitscherlich sulphite (R. 66). The mode and place of delivery are shown as "Ex-dock New York" in both instances. (R. 63; 66.)

Under "Price" appears "2¾¢ per lb., air dry weight; exclusive of duty, if any" in one contract (R. 63), and "at 2.88¢ per lb., ex-dock N. Y., 'exclusive of duty'" in the other contract (R. 66).

Mr. Goldberg testified that each contract was for a particular class of pulp bought from a particular concern; that these contracts are always filled with the grade ordered, and that when a grade is ordered, it is not always known where it will be produced, other than it would come from abroad. (R. 41.) This witness further stated:

> A. We know that the pulp wood is marked by a number or brand, not actually marked for anybody at any time so far as my experience goes.

Q. When is the marking that shows that it is for the Hamersley Manufacturing Company put on it, if ever?

A. If it is ever put on, it is put on on the other side. There is nothing put on except the number or the brand or the trade mark, or whatever it may be to identify it. (R. 43–44.)

When we contract for the shipment to us of imported wood pulp, we do not know whether the boat on which it is going to be shipped is going to dock at Hoboken or at New York somewhere; we do not know on what boat it is going to be shipped until after it is shipped and the broker notifies us; then we don't bother with it. (R. 45.)

Mr. Tucker's testimony was:

A. The customers all alike buy on dock, or ex-dock, port of arrival. We receive cable advices from abroad specifying the shipments and quantities. We in turn notify the customers the name of the steamer and the quantities.

Q. That is while in transit?

A. While in transit, and the expected date of arrival. * * * (R. 46.)

* * * you see the customer buys it on dock, New York. He has to pay the freight charges from the port of arrival to his factory or mill, and he can save freight charges by sometimes sending it the entire distance by boat instead of by rail. In other words, these terms on dock or alongside vessel are merely to indicate from what point the con-

> sumer is going to bear the freight and other transportation charges. In our case—I don't know how it is about other importers—in our case all the mills we represent insist on selling on dock, port of arrival. They will not give terms over the side of the steamer on to lighter. (R. 46–47.)

The next statement of the Commission is:

> * * * The wood pulp is marked abroad by a brand but not with complainant's name. It is consigned to the broker at New York. (R. 8.)

Concerning this Mr. Goldberg testified:

> A. We know that the pulp wood is marked by a number or brand, not actually marked for anybody at any time so far as my experience goes. (R. 43.)
>
> * * * It is the custom in the pulp trade that foreign shipments, regardless of where the contracts are made—they may be made for shipments to Chicago, the steamers land in New York and the broker handles it for reshipment but it goes right through from the other side, to the mill, frequently without interruption. (R. 42.)

Continuing the Commission found:

> * * * The bales destined for complainant may be only a part of a large cargo but the total number of bales allotted to it is always delivered at Garfield. (R. 8.)

This is substantiated by the testimony of Mr. Goldberg that:

* * * they [the brokers] often tell us the shipment consists of a thousand bales, of which 500 are for you. (R. 44.)

Mr. Tucker testified:

A. * * * his [the foreign shipper's] cables of shipments specify the customers for whom the pulp is intended.

Q. You have cables?

A. And the quantities; yes.

Q. Showing the shipment aboard a certain steamer of certain lots of wood pulp?

A. That is correct.

The cables indicate what tonnage is going to Hamersley, and what tonnage might go to other customers. That tonnage always goes to Hamersley which is on board this vessel when it leaves the foreign port—that is, the tonnage specified in the cable, to fill the Hamersley order. I have never known of a case of Hamersley shipments being diverted to anybody else or a portion of the shipments. (R. 46.)

Continuing, the Commission stated:

* * * The broker gives dock orders to the Hoboken Manufacturers' Railroad specifying delivery of the required number of bales, and makes out the bill of lading for the shipments to Garfield. (R. 8–9.)

Mr. Tucker's testimony on this was:

* * * Upon arrival of the steamer, I personally or somebody in the office staff make out the inland bill of lading and give the instructions to the carriers.

Q. For the forwarding of the shipments from alongside the vessel?

A. From dock or alongside the vessel, over the side of the vessel if the customer wants it that way, but always on dock unless he specifies over the side of the steamer. (R. 46.)

Mr. Hobbs, Freight Agent, Hoboken Manufacturers' Railroad, said:

> The broker furnishes us a dock order, and it reads, Please deliver to the Erie Railroad, or Hoboken Manufacturers Railroad, so and so, 50 bales of wood pulp, ex-steamship so and so. He puts ex-steamship so and so on that order, so the steamship people will be able to designate what lot it is. (R. 49.)

Continuing, the Commission said:

> * * * The bills of lading carry an entry "from S. S. * * *, Pier * * *, Hoboken, N. J." (R. 9.)

On this, the court is respectfully referred to the typical bill of lading (R. 56), introduced as Exhibit 15. It will also be noted that this bill of lading states:

> Received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading, from steamer "Pres. Harding," Pier 3, Hoboken, N. J., the property described below * * *
>
> Consigned to The Hamersley Mfg. Co.
>
> Destination, Garfield, State of N. J. (R. 56.)

certain quantities of wood pulp, described in the bill of lading.

The next statement of the Commission is:

> * * * By arrangement between complainant and the broker the wood pulp is usually shipped in lots of two or three cars to enable complainant to unload promptly, and thus prevent congestion on the industrial tracks at Garfield. (R. 9.)

Mr. Goldberg testified on this point:

> * * * when we are advised by a broker that a shipment for us containing, let us say, a thousand bales, is aboard a certain steamer on its way to New York at Hoboken, due to arrive at a certain time, that the brokers have general instructions in writing that upon the arrival of that shipment * * * at the port, that it be distributed from the port over as many days as possible in order that we may be able to unload the cars with our facilities on those days. Very often in addition are given specific instructions, so that we have sometimes had 30 cars set in there in one day, and we can not unload them fast enough without incurring tremendous charges and additional expenses. We have standing instructions with these brokers or mill agents that they distribute as they arrive on these boats—stretch them out as much as they can. I presume that necessarily results in some of these cars laying in Hoboken for several days at a time. If they all came in at one

time, let us say 20 cars, it would not be possible for us to handle that many cars within the regular time. We would have a good many extra days for the unloading. (R. 44–45.)

The concluding sentence by the Commission is:

Pulp is not shipped to the broker for sale to customers to be obtained after its arrival. (R. 9.)

On this Mr. Tucker said:

* * * We never sell to anybody any of this wood pulp while it is en route—that is, after it leaves. We never make a contract with any purchaser to cover stuff which is in transit; we are mill agents on commission. The orders are obtained from the customers before they are sent to the mills abroad. (R. 47.)

The Commission then called attention to the carriers' contentions, as follows:

Defendants contend that the title to the goods does not pass to complain[an]t by the terms of the contract until the broker at New York has taken affirmative action after the wood pulp has been unloaded by the steamship company on its docks; and that the movement thence by rail to Garfield is an entirely independent transaction. They urge that it is a reshipment of goods from a distributing point in intrastate commerce, and accordingly beyond our jurisdiction. *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Louisiana* v. *Texas & Pacific*

Ry. Co., 229 U. S. 336; *Chi., Mil. & St. P. Ry.* v. *Iowa*, 233 U. S. 334; *Atl. C. L. R. R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, are cited to support this view. On exceptions they state that there is no evidence to show a continuing intent of any of the parties that any specific bales comprising a part of the steamer shipment shall go to the complainant. (R. 9.)

The conclusions and findings of the Commission were then stated, as follows:

> The record convinces us that the broker acts only as an agent, and that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield, and therefore, that the traffic is of the character over which we have jurisdiction. The time of passing title to complainant is immaterial in so far as the character of the transportation is concerned. (R. 9.)
>
> * * * * *
>
> We find that the rate from Hoboken to Garfield was, is, and for the future will be unreasonable to the extent that it exceeded, exceeds, or may exceed 10 cents. * * * (R. 12.)

It seems obvious from the above that there is a continuing intent on the part of the foreign mill, the New York broker, and the American customer to have a particular brand and quantity of wood pulp transported from the foreign mill direct to

Garfield, N. J., without any interruption except that necessary in the importation of all goods from abroad. Also the bill of lading the rail carrier *requires to be issued* (R. 52), indicates the name of the steamer, the pier at which it is docked, and the fact that the goods are destined to the Hamersley Manufacturing Company, Garfield, N. J. (R. 56.)

The handling of the goods and compulsory rebilling at the port of Hoboken, are but *incidents* in the through transportation of the wood pulp from the foreign mill to Garfield, N. J., and do not change the character of the transportation, which at all times is "from a point in a foreign country to a point in the United States."

Further, the witness for the carriers, who testified as to how the shipments of wood pulp are handled at Hoboken, said that although he was fully familiar with the manner of handling of import shipments at Hoboken and had been employed by the Hoboken Manufacturers Railroad for a great many years, his line never received through steamship bills of lading (R. 52), and that when a shipment of any kind which is imported, arrives at Hoboken, the carrier gets the identical dock order and the identical kind of railroad bill of lading, either through a broker or through the owner of the goods, as it does in the case of wood pulp (R. 52); and that so far as the carriers know, they would never be in a position to distinguish between a shipment which moved under a through bill of lading, if

such were possible, and one moving on a steamship bill of lading to the port of entry and the carriers' bill of lading beyond, because, in any event, his line would demand that a new railroad bill of lading be issued at Hoboken before the shipment could move from Hoboken to the interior point (R. 52–53). Would not the effect of this be to hold that if the wood pulp involved here is not import traffic then all shipments imported through Hoboken are in intrastate, and not in foreign, commerce?

The seller in the foreign country knew at all times that so many bales of wood pulp of a particular brand were destined to Hamersley at Garfield (R. 46). Merely because the contract indicated that the Hamersley Company would have to bear the transportation charges from the port of entry, and the shipper from the foreign mill to the port of entry (R. 47), has nothing to do with the determination of the character of the traffic. The record further shows that the foreign miller always knows that the shipments he is making under these contracts are going to the Hamersley Company, and that his cables to the "broker" show the shipment by a specified steamer of certain quantities of wood pulp, and specify the customers for whom the pulp is intended. (R. 46.)

Under these circumstances we think the facts make this case even stronger than *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,*

219 U. S. 498, where the Commission's jurisdiction was sustained. In the case last cited there was involved the validity of a Commission order requiring the Terminal Company to cease and desist from granting certain advantages and preferences to one Young, a shipper of cottonseed products at Galveston, Tex., over the Terminal's docks and piers, and in allowing Young storage and handling room on its piers and docks while denying such privileges to other shippers.

In stating a contention similar to the one now being advanced here, and in overruling it, this court said:

> The last contention advanced is that "the order of the Commission transcends its jurisdiction, in that it regulates commerce purely State and intrastate, and also purely foreign commerce, neither of which is subject to its authority."
>
> In support of this contention it is insisted that the evidence shows the following facts; The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and way bills, showing the point of origin in those States and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston.

At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships' bills of lading made to his order.

* * * * *

* * * the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harriburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol,* 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transpor-

tation to another State, or delivered to a carrier for transportation." (Id. 525–527.)

It will be noted that in the *Southern Pacific Terminal Co. Case,* the court said, p. 526: "The purchases are made for export, there being no consumption of the products at Galveston." In this case there is likewise no consumption of the products at Hoboken, as all the wood pulp, whether intended for shipment to Garfield or somewhere else, has, so far as the record shows, a rail movement beyond Hoboken. The fact that some of the bales may remain on the docks or piers several days, awaiting cars or so as not to overcrowd the somewhat limited unloading facilities of the Hamersley Company at Garfield, does not break the continuity of the movement. (*Carson Petroleum Co.* v. *Vial, et al.,* 279 U. S. 95 (decided April 8, 1929).)

Other cases supporting our contention that the commerce involved is interstate and/or foreign in character, are *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166; *Ohio R. R. Comm.* v. *Worthington,* 225 U. S. 101; the *Sabine Tram Case,* 227 U. S. 111; *Goldsboro Chamber of Commerce Case,* 91 I. C. C. 315; *Express Publishing Co.* v. *G. H. & S. A. Ry. Co.* 85 I. C. C. 203–4; *Atchison, Topeka & Santa Fe Co.* v. *Harold,* 241 U. S. 371; and *Hughes Bros.* v. *Minnesota,* 272 U. S. 469, 475.

The latest decision of this court on this subject is its decision of April 8, 1929, in *Carson Petroleum Co.* v. *Vial, et al.,* 279 U. S. 95, and the decision in the *Carson Case* is quite persuasive of the jurisdic-

tion of the Commission here. In the *Carson Case,* this court stated the general principle that "there has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through." The facts in the *Carson Case* were:

The Carson Petroleum Company purchases oil from refiners in the Mid-Continent Field (Kansas, Oklahoma and Texas). The oil is shipped in railroad tank cars consigned to the Carson Company at St. Rose, La., a few miles above New Orleans. At St. Rose there are tanks and equipment for assembling or receiving from railroad tank cars cargoes of oil and loading it aboard ships for export. No oil was sold at St. Rose except what is exported. The only business conducted there is the unloading of the oil from railroad tank cars into storage tanks and the loading of the oil from the storage tanks aboard vessels for shipment to foreign ports. The shipments from the Mid-Continent Field to St. Rose were not made on through bills of lading, but on an export rate, which was lower than the domestic rate. The oil was of a high grade especially adapted for use in foreign automobiles. The Carson Company takes orders for cargoes of oil from foreign buyers, who charter the vessels to transport the oil from St. Rose to the foreign ports. The company always has orders for more oil than there is at St. Rose, and

buys the oil in the Mid-Continent Field to fill orders already received from foreign buyers. The oil in each tank car is not assigned to any shipment abroad, but is pumped into large storage tanks, where it is held either until a ship arrives or until enough oil is accumulated to make up a cargo. It takes 10 to 16 trains of tank cars, or 300 to 500 cars, to make up a cargo of oil. A delivery of the oil thus sold is made by loading the oil aboard the ship chartered by the buyer. Until the oil is loaded aboard ship it belongs to the Carson Company, is insured in its name, and loss is payable to it. At times there is oil in the tanks awaiting the arrival of a ship, and at other times the ship is awaiting the accumulation of enough oil to make up a cargo. To save heavy demurrage charges, the Carson Company endeavors to have enough oil on hand at St. Rose to fill each order promptly on arrival of the ship. Because of demurrage charges on tank cars and on steamships, it would be impracticable to carry on the export business in oil by any other method than storage in tanks as the trains of oil arrive, and shipping from the accumulation when the ships arrive. The oil is not treated in any way between the time it is placed in the storage tanks and on the ships. It is never kept at St. Rose longer than necessary, and the quantity on hand is always awaiting either the arrival of a ship or the accumulation of a sufficient quantity to load a ship.

After setting out the facts as above, this court summarized the claim of the State authorities that the oil was subject to local taxation by saying:

> * * * On the other hand, the State authorities claim that there were two separate shipments—the one which ended when the tank cars arrived and were unloaded at St. Rose, and the foreign shipment, which began when the oil was loaded aboard ship for a foreign port. Hence they contend that while the oil was stored in the tanks at St. Rose, under the protection of the State and local government, it was subject to State and local taxation, even though intended and prepared for exportation.

These claims of the State of Louisiana in the *Carson Petroleum Case* are similar to the grounds upon which the District Court set aside the Commission's order in this case. The District Court stated:

> It is to be borne in mind that there are always two transactions. The American manufacturer deals with the New York broker for obvious reasons. The foreign producer deals with the New York broker for similar reasons. The pulp belongs to the broker when it arrives in New York Harbor, and he initiates the rail transportation. Without the independent act of the New York broker the pulp would never move beyond New York Harbor. The broker stands in the transaction not as a means of changing the

> nature of the transaction but as the instigator of an independent transaction. (R. 29.)

In the *Carson Case* this Court said:

> The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit.

After reviewing pertinent decisions, this Court based its decision that the commerce involved was interstate in character largely upon the *Sabine Tram Case,* 227 U. S. 111, saying:

> In *Texas & New Orleans R. R.* v. *Sabine Tram Co.,* 227 U. S. 111, the question was whether the rates charged on shipments of lumber on local bills of lading from one point in Texas to another, but destined for export, were intrastate or foreign commerce. The exporter purchased the lumber from other mills in Texas with which to supply its sales in part. It did not know when any particular car of lumber left the starting point into which ship or to what particular destination the contents of the car would ultimately go, or on which sale it would be applied; this not being found out until its agent inspected the invoice mailed to and received by him after shipment. The lumber remained after arrival at the shipping port in the slips or on the dock until a ship chartered by the exporter arrived, when the exporter selected the lumber suited for that cargo and shipped it to its destination. There was no local

market for lumber at the port of shipment, the population of which did not exceed fifty, and the exporter had never done any local business at that point. This Court held that the shipments to the point of shipment from other points of Texas were in interstate and foreign commerce and should pay rates accordingly. The Court said, p. 126:

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

Again this Court said, p. 130:

"And the shipment was not an isolated one but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a

break, in the sense of the Interstate Commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine. *Swift & Co.* v. *United States,* 196 U. S. 375. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

See also *Railroad Commission* v. *Texas & Pacific Ry.,* 229 U. S. 336; *Spaulding & Bros.* v. *Edwards,* 262 U. S. 66, 70.

We do not think the *Sabine Tram case* can be distinguished from the one before us. It has been suggested that in the present case there was a failure to fix the exact point of destination abroad before shipment and that this prevents the continuity required in a continuous exportation. But there was the same indefiniteness on this point in the *Sabine Tram case.* Then, it is said, there was no separation of the various shipments of oil from the interior points to the tanks and thence to ships at the port of shipment. But in the *Sabine Tram case* cars of lumber were sent to the transshipment point without regard to the filling of one order or another. In both cases the delay in transshipment was due to nothing but the failure of the arrival of the subject to be shipped at the same time as the arrival of the ships at the port of transshipment. The use of the tanks at the point of transshipment can not be distinguished from the storing of the lumber on the docks or in the slips between them till the ves-

> sel to carry it should be ready. The quickness of transshipment in both cases was the chief object each exporter plainly sought. In both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose. No lumber or oil was sold there but that to be exported. There was no possibility of any other business there. * * *

This court has long recognized that the question as to where title passes is not determinative of the character of the commerce. In *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, at pages 465–6, the court said:

> In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and the provisions of the Act to Regulate Commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply.

Yet the District Court in this case bases its opinion that the commerce involved was intrastate largely on the question of where the title to this wood pulp passed. It said:

> * * * How can it be said that he [the foreign shipper] has any concern or any in-

> tention that pulp should reach the Hamersley Manufacturing Company or anyone else? And if he did have such intention, what of it since the New York broker has title until the pulp is delivered on board the cars at Hoboken. * * * If loss has occurred at sea, it would not fall on the Hamersley Company, because it has no title. It would fall, however, on the New York broker, because he has paid for the goods. * * * The pulp belongs to the broker when it arrives in New York Harbor, and he initiates the rail transportation. Without the independent act of the New York broker the pulp would never move beyond New York Harbor. The broker stands in the transaction not as a means of changing the nature of the transaction but as the instigator of an independent transaction. (R. 29.)

This is where the District Court erred, because if, as the court finds (R. 29), the title passed from the shipper to the broker when the goods were loaded aboard the vessel at the foreign port, it would then be undisputed that at least, from the time the shipments left the foreign port, it constituted a through shipment from that port direct to Hamersley Manufacturing Company at Garfield. Under such circumstances, the re-billing and interruption at Hoboken would be only incidents in the through transportation.

Nor do we see the relevancy of the statement in the opinion of the District Court that "the railroad company has nothing to do with determining

the ultimate destination of the pulp." (R. 27.) So far as we know that determination never really lies with the carrier. It is solely a function exercised by the shipper. The carrier is the instrumentality of transportation of which the shipper and consignee, acting in concert, avail themselves in having the goods carried from the point of origin to final destination.

The lower court stated further that if loss occurred at sea it would fall, not on the ultimate consignee at Garfield, but on the "broker." (R. 29.) We submit this is of no effect in determining the character of the transportation from a jurisdictional standpoint. The liability for such loss is subject to various circumstances dependent upon terms of sale and contracts not controlling in the determination of whether the transportation is subject to Commission jurisdiction.

The District Court also held that:

> * * * mere knowledge by the foreign shipper that the pulp sold to the New York broker is purchased for resale cannot make the shipment by the New York broker to his New Jersey vendee a part of the original movement. (R. 29.)

The contracts in evidence themselves prove the pulp is not "purchased for resale." It has been sold to the ultimate consumer long before the shipment started from the foreign mill. If the "broker" or mill agent *"purchases" the pulp at all,* he does so, *not for resale,* but in fact for *delivery to Hamersley*

at Garfield, with whom he has contracted in advance of shipment, to supply the pulp at stated intervals. The "broker" offered unimpeached testimony that he never sold wood pulp to *anyone* except that covered by contracts executed with customers prior to shipment from the foreign mill. (R. 47.)

The court's statement "without the independent act of the New York broker the pulp would never move beyond New York Harbor" (R. 29) is subject to comment. The "broker" testified that what he did upon arrival of the goods at the Hoboken docks, was done "as a matter of courtesy." (R. 47.) It seems obvious that without any act of the "broker" it would have been incumbent upon either the customer (Hamersley), or the foreign mill itself, to execute a rail bill of lading to Garfield, which the carrier testified was necessary on all freight. This is clear from the contract which specifies shipments are to be made to Hamersley Mfg. Co., Garfield, N. J., from "*abroad,*" at a price "Exdocks New York." (R. 63; 66.)

(b) The interruption at Hoboken was solely such as occurs generally in the case of import traffic coming in by vessel and moving out by rail, and was merely for separation and assortment for the convenience of shipment to its destination

In *Public Utilities Commission* v. *Landon,* 249 U. S. 236, the court, at page 245, said:

> * * * Interstate commerce is a practical conception and what falls within it must be determined upon a consideration of established facts and known commercial methods

This court, in *Savage* v. *Jones,* 225 U. S. 501, said:

> * * * commerce among the States is not a technical legal conception, but a practical one drawn from the course of business. (Id. 520.)

The "known commercial methods" or "course of business" with respect to import traffic, are well known. Import traffic is generally subjected to considerable delays in transfer at ports of entry from steamers to cars. The property must be unloaded first upon docks alongside vessels. It is subject to checking and inspection by customs officials. Much detail is involved before the freight can be trucked from the docks to the railway yards and loaded into cars. These delays are not peculiar to the wood pulp here in issue but exist with respect to all import traffic. The only "delay" with respect to this wood pulp occurred in certain instances where a larger cargo was received at one time than could be unloaded with the facilities existing at Garfield. In the *Carson case* there was "delay" because the oil was pumped into storage tanks, to be held either until a ship arrives or enough oil is accumulated to make up the cargo; nevertheless this court held such oil was not subject to local taxation. No part of the wood pulp here involved goes into a warehouse for storage, but is unloaded on to the steamship pier, and then loaded direct by the Hoboken Manufacturers' Railroad on to the cars. (R. 49.)

In *State* v. *Engle,* 34 N. J. L. 425, cited with approval in *Champlain Realty Company* v. *Brattleboro,* 260 U. S. 366, coal mined in Pennsylvania was shipped by cars to Elizabethport, N. J., to be thence shipped by water to other markets for the purpose of sale. At Elizabethport on tidewater the coal was deposited and separated according to its different sizes, and when a cargo of one size was obtained it was shipped to points in other states as soon as a vessel could be chartered to carry it, no coal being sold for consumption at Elizabethport. The Court said:

> The power of the state to tax the subjects of commerce, where their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the mass of property in the community, is well settled. But that a tax on property belonging to a citizen of another state, in its transit to market in other states, which is delayed within this state, not for the purpose of sale, but merely for separation and assortment for the convenience of shipping to its destination, is a tax on commerce among the states, is too plain to require argument.
>
> Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the state for the purpose of taxation.

Swift & Company v. *United States,* 196 U. S. 375, is one of the cases involving an alleged combination in restraint of trade, in which this Court said:

> * * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. * * *
>
> It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500. (Id. 398.)

How much stronger is the instant case where the interruption at tidewater was not for the purpose of procuring a purchaser, but solely for the purpose of transferring from water to rail transportation.

Railroad Commission of Ohio v. *Worthington,* 225 U. S. 101, was a case involving the right of the Ohio Railroad Commission to regulate the railroad freight rate on coal mined in Ohio and shipped by rail, under an export freight rate, either to Huron or Cleveland, where the railroad has elaborate facilities for loading into vessels. The coal may be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time, when it is put upon vessels

and shipped out of the State, and on those facts this Court held:

> By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the commission, which is in controversy here, is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, * * *. (Id. 108.)

Stafford v. *Wallace,* 258 U. S. 495, also is of interest. In that case, involving the validity of the Packers' and Stockyards' Act, and in describing the manner of doing business in the stockyards, this Court said:

> The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and train load lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or

> dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensable to its continuity. * * * (Id. 515–516.)

The commission men referred to in *Stafford* v. *Wallace* may be likened to the "broker" at New York in this case.

The appellees' main reliance in the court below was on *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.*, 275 U. S. 257. In holding the shipments involved in that case to be intrastate in character this court said:

> The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation.

> * * * There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal. * * *

We think this case is easily distinguished. Here there is "necessity" and "purpose," as shown by the dates of delivery called for by the contracts (R. 63; 66) that the wood pulp go right through "to interior points by immediate continuity of transportation." Further, the interior destination, Garfield, is fixed "in the minds" of the foreign mill, whose cables specify for whom the pulp "aboard a certain steamer" is intended. (R. 46.)

When the facts are viewed in the light of the opinions rendered by the court in the leading cases involving the question of whether commerce is interstate or intrastate the conclusion is inescapable that the character of the traffic here in issue is subject to the jurisdiction of the Commission. This conclusion conforms not only to the well established principles announced by the court in the many cases involving similar questions but conforms to the customs and practices in the foreign trade between this and other countries.

The effect of the decision of the District Court in this case is to seriously restrict the provisions of the Interstate Commerce Act wherein Congress expressly gave the Commission jurisdiction on traf-

fic moving "from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States, * * *."

The decree of the lower court should be reversed and the injunction dissolved and bill dismissed.

E. M. REIDY,

For Interstate Commerce Commission.

D. W. KNOWLTON,

Of Counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1929

FILE
OCT 25
CHARLES ELMORE

FILE COPY

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

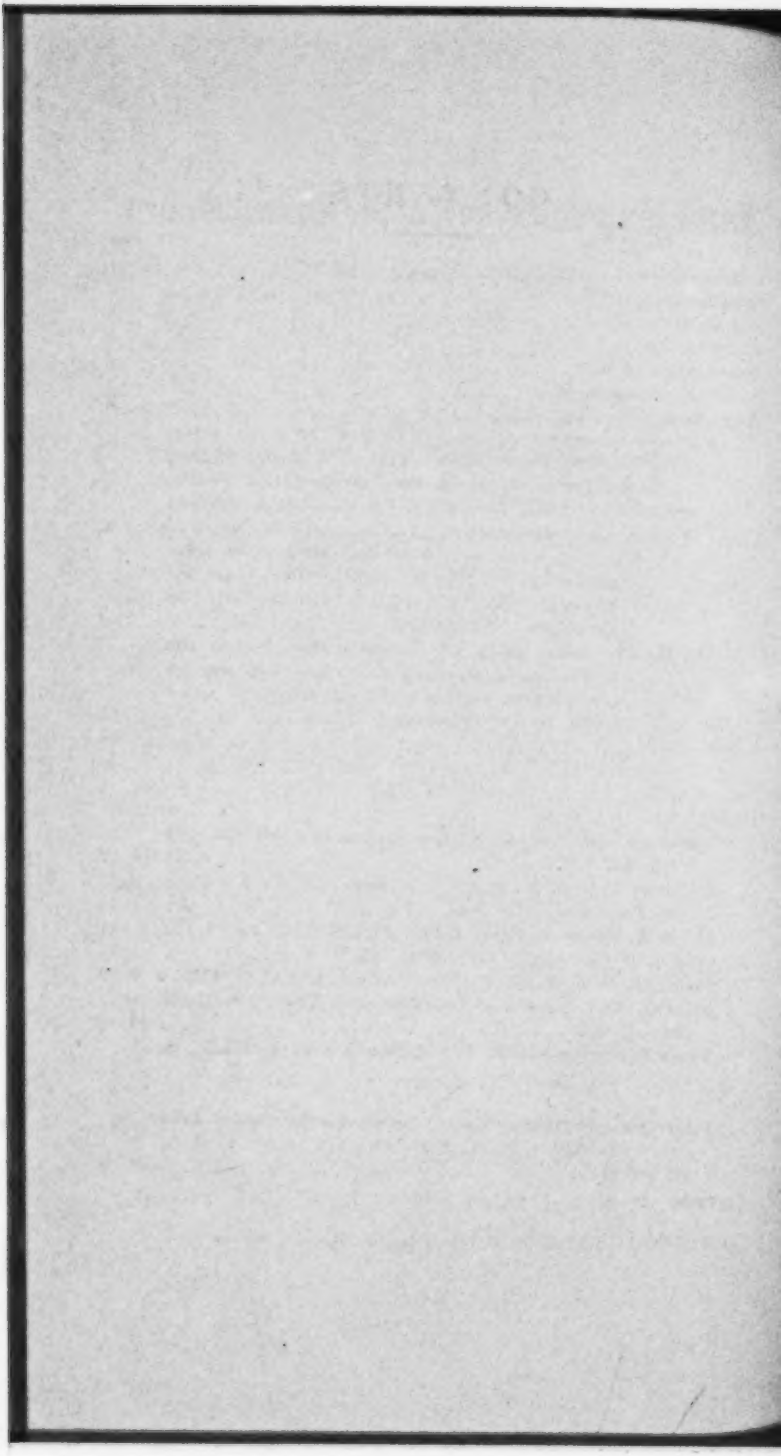
BRIEF FOR THE UNITED STATES

CONTENTS

	Page
Opinion below	1
Question	2
The statute	3
Statement	4
Specification of error	7
Summary of argument	8
Argument	8
A proper consideration and weighing of the whole group of facts compel the conclusion that, as a matter of law, the commerce involved in the transportation of the imported wood pulp from the pier at Hoboken to Garfield is interstate in character	8
I. The facts show that from the moment the shipments left the foreign mill Garfield, and not Hoboken, was the intended destination fixed in the minds of the parties	10
II. The interruption at Hoboken was due to the necessities of transportation, and was not for the purpose of storage, distribution, or other commercial convenience	12
Conclusion	18

CITATIONS

Cases:	
Atlantic Coast Line R. R. Co. v. *Standard Oil Co.*, 275 U. S. 257	9, 11, 15, 17
Baltimore & O. S. W. R. R. Co. v. *Settle*, 260 U. S. 166	9, 11
Carson Petroleum Co. v. *Vial*, 279 U. S. 95	13
La. R. R. Comm. v. *Texas & Pac. R.*, 229 U. S. 336	11
Ohio R. R. Comm. v. *Worthington*, 225 U. S. 101	12
Pennsylvania R. R. Co. v. *Clark Coal Co.*, 238 U. S. 456	9, 16
So. Pac. Terminal Co. v. *Interstate Com. Com.*, 219 U. S. 498	14, 16
Texas & New Orleans R. R. v. *Sabine Tram Co.*, 227 U. S. 111	14
Statute:	
Interstate commerce act, sec. 1, as amended by act of February 28, 1920, c. 91, 41 Stat. 456, 474 (U. S. C. Title 49, sec. 1)	3



In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 30

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the specially-constituted District Court (Circuit Judge Davis and District Judges Rellstab and Bodine) for the District of New Jersey, holding the order of the Interstate Commerce Commission (hereinafter called the Commission) to be void for lack of jurisdiction on the ground that the rates prescribed were for transportation of intrastate commerce, is reported as *Erie Railroad Co. et al.* v. *United States*, 32 F. (2d) 613, and is printed in the record at pages 26–29.

QUESTION

At Garfield, N. J., Hamersley Manufacturing Company (hereinafter called Hamersley Company) is engaged in making paper which it manufactures from imported wood pulp. It makes an offer for a certain quantity and quality of wood pulp to brokers or "mill agents" in New York, and the latter cable that offer, with offers of other customers, to a mill located in Germany or Sweden. The mill accepts by cable to the broker, who then makes a sales contract between himself and the Hamersley Company. The pulp is shipped by the foreign mill, on an ocean bill of lading, consigned to the New York broker, accompanied by a cablegram specifying the customers, including the Hamersley Company, for whom the pulp, marked according to quality, is intended. Upon its arrival at Hoboken the broker makes out a rail bill of lading upon which the pulp is transported by rail to Garfield, N. J.

The question is whether the rail transportation of this pulp from Hoboken to Garfield involves commerce of such character as to bring it within the provisions of Section 1 (1) and (2) of the Interstate Commerce Act; that is, has the Commission jurisdiction to prescribe rates to be charged by the railroads for transporting said property between those points.

THE STATUTE

The pertinent language of Section 1 of the Interstate Commerce Act as amended by the Act of February 28, 1920, c. 91, 41 Stat. 456, 474 (U. S. C. Title 49, Sec. 1) is:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> (c) The transmission of intelligence by wire or wireless; —
>
> from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers

and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

* * * * *

STATEMENT

The Hamersley Company alleged, in its complaint to the Commission, among other things, that the rate charged by appellees for the transportation of imported wood pulp from Hoboken, N. J., to Garfield, N. J., was unreasonable. It asked the Commission to prescribe the reasonable rate therefor, and to award reparation. (R. 15.)

Upon the testimony, and after hearing argument, the Commission found the rate to be unreasonable, prescribed a reasonable rate, and awarded reparation. (R. 12–14; 126 I. C. C. 491.)

At the second hearing appellees challenged the Commission's jurisdiction, contending that the commerce involved in the rail movement from Hoboken to Garfield was intrastate. The Commission found that the rail movement was but a continuation of the transportation begun when the shipment left the foreign mill, that there was "a continuing intent on the part of the shipper" that the pulp should be transported to Garfield, the place

of business of the purchaser, and that, therefore, the rail transportation was of the character over which it had jurisdiction. (R. 9.) It thereupon entered the order (R. 13–14) which is the subject of this suit (148 I. C. C. 47).

The court below, upon the same evidence as was before the Commission, and without indicating that it gave any weight to the Commission's findings, enjoined enforcement of the order, on the ground that "the essential character of the transaction is in intrastate and not interstate commerce," and, hence, it was beyond the Commission's jurisdiction to prescribe rates for the rail transportation. (R. 29, 30.)

The facts, in outline, concerning the financial transaction, the ocean and rail transportation, and the physical handling of the shipments are as follows:

The Hamersley Company makes an offer to a broker or mill agent at New York for certain quantities and grades of wood pulp. The brokers are "agents on commission" of the foreign mill. (R. 45, 47.) The broker communicates this offer by cable to a foreign mill, which cables its acceptance to the broker who then enters into a contract between himself and Hamersley Company. (R. 45, 46.) The contract (R. 63, 66) covers the quantity and grade of pulp to be purchased, and specifies that shipment will be made from the foreign mill at a stated number of tons per month, delivery to be made "Ex-dock New York" (meaning New York

Harbor, which includes Hoboken). The forms of contract appear at pages 63–68 of the Record.

When the pulp ordered by Hamersley Company is ready for shipment from abroad, it is placed on a steamer with pulp ordered by other customers through the New York broker, and the whole lot is covered in one ocean bill of lading with the broker named as consignee. (R. 47.) For the convenience of his customers the broker pays for the pulp before it leaves the foreign port. (R. 47.)

The foreign mill cables the broker that a certain quantity of pulp is aboard a certain steamer, specifying the customers for whom the several lots of pulp are intended. "The cables indicate what tonnage is going to Hamersley." (R. 46.) The separate bales are stamped or marked abroad to indicate the quality of the pulp, but they are not marked with the name of the customer. (R. 43, 44.)

The shipments have been going on for some years. One witness testified that from the early part of 1923 to January 1, 1928, 900 carloads were routed to the Hamersley Company by the defendant from Hoboken to Garfield (R. 74).

When the steamer arrives at Hoboken, an arrival notice is sent by the steamship company to the broker. He then furnishes the Hoboken Manufacturers' Railroad with a dock order (R. 49) and shipping instructions, namely, a bill of lading. The steamship company then delivers the pulp to the Railroad, and the quantity specified in the bill is

loaded and transported over lines of the appellees to Garfield. (R. 49, 50.)

The broker receives the shipments from the steamer, gives directions and orders for the rail transportation, and handles the entire transaction at the Hoboken dock. (R. 46.) The Hamersley Company has "nothing to do with it until the pulp arrives at Garfield." (R. 44.)

Ordinarily the pulp moves promptly from the dock to the mill at Garfield. It "goes right through from the other side, [foreign port], to the mill, frequently without interruption." (R. 42.) If an order contains a large number of bales Hamersley Company instructs the broker to distribute the rail shipments over "as many days as possible in order that we [Hamersley] may be able to unload the cars with our facilities on those days." (R. 44, 45.) The pulp may lie on the pier several days before shipping orders are given the railroad. "It takes the steamship that long to discharge, and sometimes the goods lie there for weeks" (R. 50), but it is "seldom that a shipment stays there two or three weeks for Hamersley." (R. 51).

The bales intended for the Hamersley Company when shipped from abroad are always delivered to it at Garfield and are never sold or diverted to any one else. (R. 46, 47.)

SPECIFICATION OF ERROR

The District Court erred in holding that the commerce involved in the rail transportation from Hoboken to Garfield was intrastate in character,

and in annulling and enjoining enforcement of the Commission's order on that ground.

SUMMARY OF ARGUMENT

The whole group of facts, considered and weighed together, establishes that the commerce involved is interstate or foreign in character, and subject, therefore, to the Commission's jurisdiction.

The evidence shows that Garfield, N. J., was at all times fixed in the minds of all parties as the ultimate destination of the shipments. The actual movement was continuous from the foreign mill to that destination, with only such interruption at Hoboken as was necessary for transfer from ship to cars.

Ignoring these facts, the District Court erroneously rested its decision upon the incidents of forms of contract, billing, and the point at which title to the property passed.

ARGUMENT

A Proper Consideration and Weighing of the Whole Group of Facts Compel the Conclusion that, as a Matter of Law, the Commerce Involved in the Transportation of the Imported Wood Pulp from the Pier at Hoboken to Garfield is Interstate in Character

The question whether commerce is interstate or intrastate must be determined by its essential character, and not by mere billing or forms of contract. Determination of that question is a matter of weighing the whole group of facts in respect to the com-

merce. *Atl. C. L. R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 268–269.

In *B. & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, at page 171, this Court held:

> For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic.

To the same effect is *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 465–6.

Although the whole group of facts in respect of the commerce must be weighed in determining whether it is interstate or intrastate, and billing, uninterrupted movement, continuous possession by carriers and other incidents may be important evidence bearing upon the character of the commerce, the decisions of this Court, in which it has been determined that the commerce was interstate, appear to rest largely upon two facts, to which the District Court gave little, if any weight, namely, (1) a fixed intent in the minds of the parties when the movement begins that the shipments shall continue on their way until they reach some destination outside

the State in which they originated, and (2) normal movement. Normal movement does not necessarily mean continuous movement, but means movement in the course of transportation toward the intended destination, without interruption for storage, distribution, or other purely commercial reasons, though there may be interruptions of movement for convenience of the transportation agencies.

I. THE FACTS SHOW THAT FROM THE MOMENT THE SHIPMENTS LEFT THE FOREIGN MILL GARFIELD, AND NOT HOBOKEN, WAS THE INTENDED DESTINATION FIXED IN THE MINDS OF THE PARTIES

The facts already stated show that Hamersley Company's purpose and intent in purchasing the pulp is to use it in its plant at Garfield, and of this the broker is fully cognizant. Through the broker the foreign mill accepts Hamersley Company's offer, and, in its cablegram to the broker when the pulp is ready for shipment, specifies "what tonnage is going to Hamersley" (R. 46), who knows "nothing whatever of the intermediate handling" and has "nothing to do with it until the pulp arrives at Garfield" (R. 44). When the ship docks the broker promptly forwards the pulp on its way to Garfield.

Attention is also called to paragraph 4(d) (R. 64), paragraph 7 (R. 65) and paragraph 8 (R. 65) of the purchaser's contract with the broker as additional evidence that Garfield was the destination fixed in the minds of the parties when transportation began at the foreign port. Hence, the rail

transportation from Hoboken to Garfield was but a step in the course of movement from the foreign port to the destination the shipments were originally intended to reach in this country.

The weight to be given to the intent of the parties connected with the movement of commerce in ascertaining its character, although not itself determinative, has been discussed in several cases. In *La. R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336, the Court apparently relied upon the following statement, at page 341, in reaching its conclusion that the commerce there involved was interstate or foreign:

> The staves and logs were *intended* by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans. (Italics ours.)

In *Atl. C. L. R. R.* v. *Standard Oil Co., supra,* it was held that the transportation was intrastate, the Court saying at page 269 that:

> There is nothing to indicate that the destination of the oil is arranged for or *fixed in the minds* of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. John's River Terminal. (Italics ours.)

In *B. & O. S. W. R. R. Co.* v. *Settle, supra,* the Court disregarded practically all other incidents, such as billing and reshipment, and apparently

rested its conclusion almost wholly upon the fact that the intent of the shipper at all times was that the shipments should reach the destination outside the State in which they originated. At page 173 the Court stated that in many cases reshipments are independent intrastate movements, but said:

> The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out.

See also *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101, 108–109.

II. THE INTERRUPTION AT HOBOKEN WAS DUE TO THE NECESSITIES OF TRANSPORTATION, AND WAS NOT FOR THE PURPOSE OF STORAGE, DISTRIBUTION OR OTHER COMMERCIAL CONVENIENCE

As occurs in connection with all import traffic moving by rail to an inland destination, the movement of the shipments in question was, of necessity, interrupted at Hoboken for such time as was required for the change from steamship to railroad cars. Customarily, the rail movement begins immediately (R. 43):

> Our pulp comes right through. They ship it right through as fast as the railroads will load it and handle it. We do not let it lay over there on the docks at all—no more that (n) what free time—time they give to allow it to remain on the docks.

When unusually large quantities of the pulp are unloaded at once from the steamer, the broker spreads the rail loadings and movements "over as many days as possible," at request of the Hamersley Company. (R. 45.) Sometimes the pulp may lie on the dock for several days (R. 50), but "it happens but seldom that a shipment stays there two or three weeks for Hamersley" (R. 51). Imported wood pulp is handled the same as other import traffic in so far as the railroads are concerned. (R. 51.)

The slight delay occurring in reshipment of the pulp was that which is always incident to all import traffic in transfer from steamer to cars.

The record contains no suggestion that Hoboken was at any time considered by any one to be the final destination of the shipments. Nor is there testimony to indicate that the shipments were stopped on the docks for storing, procuring orders, or other commercial reasons; or that there is any consumption of the pulp at Hoboken.

This Court has held repeatedly that interruptions in the movement of commerce due to necessity or convenience of the transportation agencies do not change its character from interstate to intrastate. Such was its holding in *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, in which it was determined that oil shipped by rail from points in Texas to St. Rose, Louisiana, where it was emptied into storage tanks and held awaiting either the arrival of ships in which the oil was to be exported, or the

accumulation of sufficient oil to load a waiting ship, was not subject to State taxation because the commerce was interstate or foreign in character. The rail shipments were not made on through bills of lading, but on an export rate which was lower than the domestic rate. The Court rejected the contention of the State of Louisiana that there were two separate shipments—one which ended when the tank cars arrived and were unloaded at St. Rose, and the foreign shipment which began when the oil was loaded aboard ship for a foreign port.

See also *So. Pac. Terminal Co.* v. *Interstate Comm. Comm.*, 219 U. S. 498, and *Texas & New Orleans R. R.* v. *Sabine Tram Co.*, 227 U. S. 111.

In both the *Sabine Tram case* and *La. R. R. Comm.* v. *Tex. & Pac. Ry., supra,* there were interruptions in the movement at the points of export for the purpose of transfer from railroad cars to steamships. In the latter case the carriers' tariffs allowed twenty days, without charging demurrage, for holding export shipments at the point of exportation. In both cases, the Court held that the interruptions in movement were mere incidents to transshipment and as such could not change the character of the commerce.

The facts in the case at bar refute any contention that the interruption at Hoboken was due to any reason other than the delays which are incident to the transshipment of all import traffic. Hence, such delay as occurred in reshipment from Hoboken to Garfield does not tend to establish that there were

two separate, distinct and independent movements of the commerce, nor that the delay at Hoboken was of such character or duration as to constitute a break in the continuity of movement within the decisions of this Court.

Indeed, it appears that only such interruptions as are caused by the shipper for commercial reasons or convenience of his business will change the character of the commerce from interstate to intrastate. This is made clear in *Atl. C. L. R. R.* v. *Standard Oil Co., supra,* page 269.

Expressions in the opinion of the court below (R. 29) indicate that it practically ignored both the intent of the parties and the continuity of movement. The knowledge and intent of the foreign shipper, the broker and the Hamersley Company that the pulp was to be transported to the Hamersley Company's plant is brushed aside with the statement that the shipper has been paid for the pulp before it leaves the foreign port and the title to the pulp is in the New York broker during the ocean movement. Regardless of the fact that there is only such delay in reshipment from Hoboken as is necessary in transfer from steamer to cars, the District Court holds that "there are always two transactions," (R. 29) apparently because the title changes at Hoboken and the broker initiates the rail movement upon a new bill of lading at that point.

The decision of the District Court appears to be therefore contrary to decisions of this Court. In *Pennsylvania R. R. Co.* v. *Clark Coal Co., supra,* page 466, this Court held that "mere billing, or the place at which title passes, is not determinative;" and in *So. Pac. Terminal Co.* v. *Interstate Comm. Comm., supra,* page 527:

> It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol,* 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transportation to another State, or delivered to a carrier for transportation." In *G., C. & S. F. R. Co.* v. *State of Texas,* 204 U. S. 403, the facts are different and the case is not apposite.

To the same effect is the holding in the *Sabine Tram case* and in the other decisions of this Court cited above.

The traffic here involved is but a part of the huge volume of import traffic of which there is a constant flow into this country. The particular shipments

were and are being handled at the port in the same manner as other import traffic. (R. 51.) Not only is there a lack of evidence tending to indicate that Hoboken was the final destination or point of consumption of the commerce in question, but there is also no basis for the contention that the shipments were interrupted and held on the piers at Hoboken for such purposes as those which this Court held in *Atl. C. L. R. R.* v. *Standard Oil Co., supra,* established the intrastate character of the commerce involved in that case. There the evidence indicated that no destination was fixed in the minds of the parties beyond the seaboard storage tanks, whereas in the case at bar the evidence establishes conclusively that Hoboken was not the intended destination, but, on the contrary, that Garfield was the ultimate destination fixed in the minds of the shipper, the New York broker, and the Hamersley Company. It was their intention that the shipments move through Hoboken to Garfield and the evidence establishes that the actual movement was in accordance with that intention. The shipments never came to rest (in the legal sense) at Hoboken. Nothing in the evidence shows that they were ever out of the hands of a carrier until delivered to the purchaser at Garfield, N. J. (R. 49, 53.) Application of well-established principles announced by this Court in the cases cited above compels the conclusion that the commerce involved is interstate or foreign in character, and that it was within the jurisdiction of the Commission.

CONCLUSION

The final decree of the District Court should be reversed, the injunction dissolved, and the petition dismissed.

CHARLES E. HUGHES, JR.,
Solicitor General.
JOHN LORD O'BRIAN,
Assistant to the Attorney General.
GEORGE C. BUTTE,
ELMER B. COLLINS,
Special Assistants to the Attorney General.

OCTOBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

FILE COPY

OCT 24
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 30

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLEES.

BRIEF FOR APPELLEES.

HERBERT A. TAYLOR,
MARION B. PIERCE,
Counsel for Appellees.

OCTOBER, 1929.

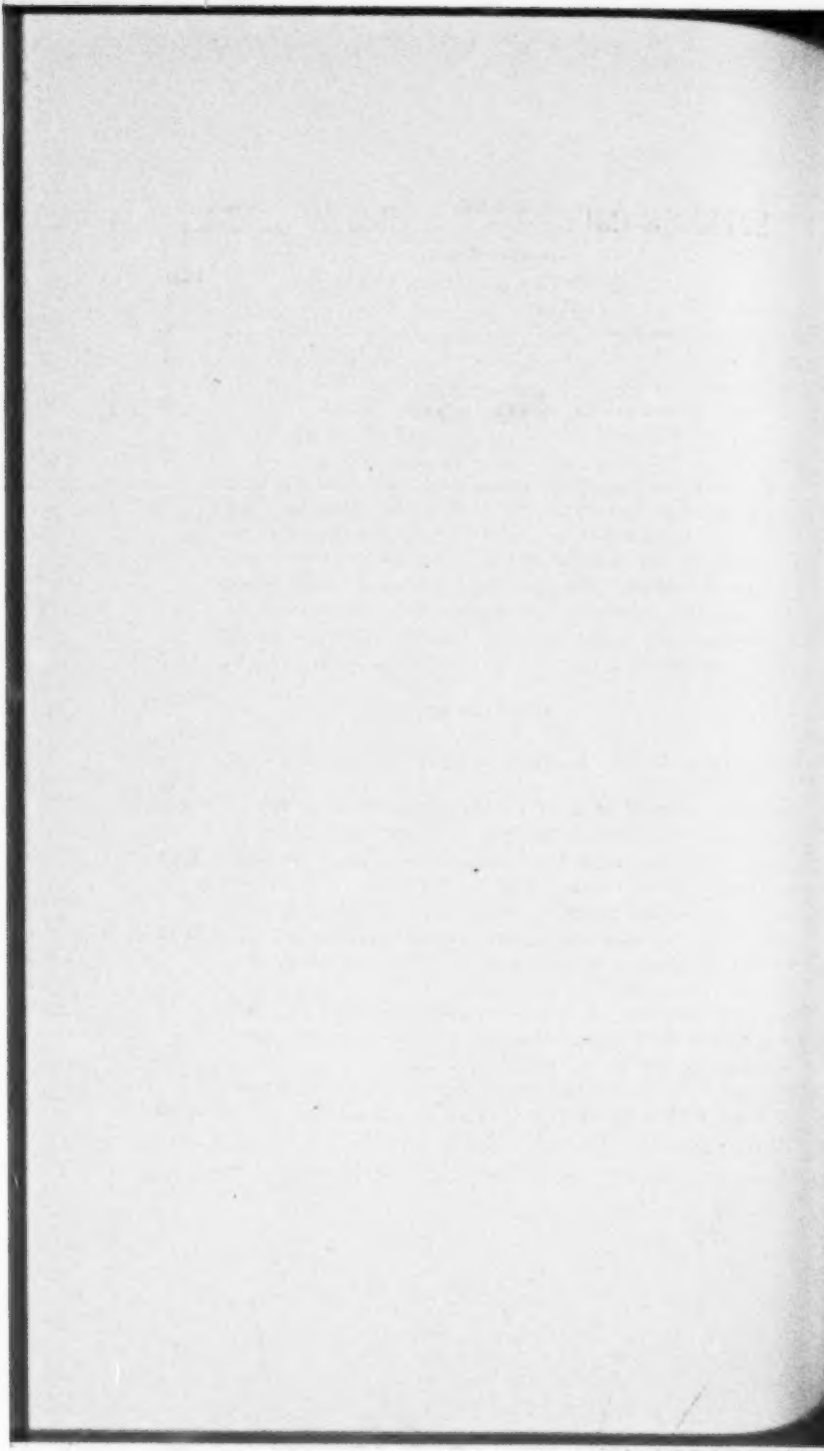
INDEX.

Subject Index.

	Page
Opinions	1
Statement of the case	2
The issue	2
The statute	2
The facts chronologically stated	3
Summary of argument	6
Argument	7
The rail transportation of the wood pulp from Hoboken to Garfield was intrastate, so that the Interstate Commerce Commission was without jurisdiction to find the rate charged therefor unreasonable and/or to fix a rate for the future. Therefore the decree of the court below, annulling, enjoining, and setting aside the order of the Commission attempting so to do, was proper and should be affirmed	7

Cases Cited.

Atlantic Coast Line R. R. Co. vs. Standard Oil Co., 275 U. S., 257	6, 7, 10
Baltimore & Ohio S. W. R. R. Co. vs. Settle, 260 U. S., 166	6, 7
Carson Petroleum Co. vs. Vial, 279 U. S., 395	17
Chicago, Milwaukee & St. Paul Rwy. vs. Iowa, 233 U. S., 334	6, 12
General Oil Co. vs. Crain, 209 U. S., 211	6
Gulf, Colorado and Santa Fe Rwy. Co. vs. Texas, 204 U. S., 403	6, 13
Railroad Commission of Louisiana vs. Texas and Pacific Rwy. Co., 279 U. S., 336	15
Railroad Commission of Ohio vs. Worthington, 275 U. S., 101	14
Southern Pacific Terminal Company vs. Interstate Commerce Commission, 219 U. S., 498	15
Texas and New Orleans Railroad Company vs. Sabine Transit Company, 227 U. S., 111	16



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 30

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

Opinions.

The written opinion of the specially constituted United States District Court for the District of New Jersey, dated December 26, 1928 (R. 26-29) is reported

1*y*

in 32 F. (2nd) 613 under the title: *Erie Railroad Company et al. vs. United States.*

The reports of the Interstate Commerce Commission appear under the title: *The Hammersley Manufacturing Company vs. Erie Railroad Company et al.*, in 126 I. C. C. 491 (R. 14-20), and 148 I. C. C. 47 (R. 7-13).

Statement of the Case.

This is an appeal from the final decree of the United States District Court for the District of New Jersey annulling, setting aside, and suspending an order of the Interstate Commerce Commission dated November 2, 1928, requiring the establishment of a rate of 10 cents per 100 pounds on imported wood pulp, in carloads, from Hoboken, N. J., to Garfield, N. J. While the transportation for which the Commission prescribed this rate of 10 cents per 100 pounds was wholly within the state of New Jersey, it found and held that the transportation was from a foreign country to a place in the United States, over which the Commission had jurisdiction.

The Issue.

The sole issue here is legal, not factual, and it is: Was the transportation interstate or foreign, or was it intrastate? If the latter, then the Commission has no jurisdiction.

The Statute.

The governing statute is found in Section 1 of the Interstate Commerce Act, which, so far as pertinent here, provides:

NOTE.—Italics ours throughout.

"That the provisions of this Act shall apply to common carriers engaged in—

(*a*) The transportation of passengers or property wholly by railroad, * * * from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.

(2) The provision of this Act * * * shall not apply—

(*a*) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid; * * *."

The Facts Chronologically Stated.

The Hammersley Manufacturing Company uses in its plant at Garfield, N. J., in the manufacture of paper, foreign wood pulp (R. 36). It buys this pulp from dealers in New York City (R. 40). The course of the complete transaction here involved was as follows:

The Hammersley Company offered to buy from the New York dealer a particular grade or grades of foreign wood pulp (R. 40, 42, 45). The latter cabled this fact to the foreign producer and when he received an acceptance of his (the dealer's) offer he advised the Hammersley Company accepting its offer (R. 45-46),

and executed a contract *in his own name and for his own account* to sell and deliver the wood pulp to the Hammersley Company "On dock" or "Ex dock," New York Harbor, on the terms shown in the typical contract of record (R. 46, 63, 66). This contract is with the New York dealer and it provides for payment within 30 days after date of the New York dealer's invoice (R. 63, 66). The Hammersley Company does not know where the wood pulp is to come from or from what producer, although it may later learn where it came from (R. 41). The fact of the Hammersley Company's offer to the New York dealer to buy from him and the fact as to any and all offers the dealer then had from others to purchase wood pulp from him were included in the cable sent to the foreign producer (R. 47).

The wood pulp was loaded on the steamer in the foreign port and when the vessel cleared that port, the New York dealer paid the foreign producer for it (R. 47). All of the wood pulp on the steamer, so purchased by the New York dealer, was shipped under one bill of lading made out to him (R. 46-47). The bill of lading specified only the quantity on the ship (R. 47). The packages were marked so as to indicate the grade or quality, but were not marked in any way to designate that they were for the Hammersley Company or for any other (R. 43). Also all of it was billed to the New York dealer on one invoice (R. 47).

When the wood pulp arrived in Hoboken the steamer unloaded it onto its pier (R. 49) and the New York dealer was given an arrival notice by the steamship

company (R. 50). He did not ship it immediately to the Hammersley Company, but informed them of its arrival and awaited their instructions as to when to ship and how much to ship at one time (R. 43, 44, 45). When he received such instructions he made out a railroad bill of lading for the movement from Hoboken to Garfield and an order on the steamship company to deliver the proper quantity from a certain lot to Appellee Hoboken Manufacturers' Railroad Company, and delivered these documents to that company (R. 46, 49). The delivery order, or dock order, read to deliver so many bales of wood pulp "Ex steamship So and Co," the words "Ex steamship So and So" being put on the delivery order by the New York dealer so that the steamship people would know from what lot the wood pulp was to be taken (R. 49).

The Hoboken Manufacturers' Railroad Company then presented this order to the delivery clerk of the steamship company and when physical possession of the wood pulp called for by it was obtained executed the railroad bill of lading (R. 49-50). No bills of lading, delivery orders, or shipping instruction of any kind whatever are ever received by Appellees until after the steamer has arrived and has unloaded the wood pulp (R. 49). The wood pulp was then transported by Appellees to Garfield, the movement being wholly within New Jersey (R. 39).

The wood pulp not shipped each day remains on the steamship company's pier until the New York dealer furnishes further shipping instructions. As a matter

of fact some of it lays on the dock for several days (R. 45, 50, 51).

The 6th-Class rate was charged (R. 55).

The railroad bill of lading names the New York dealer as the shipper and the Hammersley Company as consignee (R. 56-57).

Summary of Argument.

THE RAIL TRANSPORTATION OF THE WOOD PULP FROM HOBOKEN TO GARFIELD WAS INTRASTATE SO THAT THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT JURISDICTION TO FIND THE RATE CHARGED THEREFOR UNREASONABLE AND/OR TO FIX A RATE FOR THE FUTURE. THEREFORE THE DECREE OF THE COURT BELOW, ANNULLING, ENJOINING AND SETTING ASIDE THE ORDER OF THE COMMISSION ATTEMPTING SO TO DO WAS PROPER AND SHOULD BE AFFIRMED.

Atlantic Coast Line R. R. Co. vs. Standard Oil Co., 275 U. S. 257.

Baltimore & Ohio S. W. R. R. Co. vs. Settle, 260 U. S. 166.

Chicago, Milwaukee & St. Paul Rwy. vs. Iowa, 233 U. S. 334.

General Oil Co. vs. Crain, 209 U. S. 211.

Gulf, Colorado and Santa Fe Rwy. Co. vs. Texas, 204 U. S. 403.

ARGUMENT.

THE RAIL TRANSPORTATION OF THE WOOD PULP FROM HOBOKEN TO GARFIELD WAS INTRASTATE SO THAT THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT JURISDICTION TO FIND THE RATE CHARGED THEREFOR UNREASONABLE AND/OR TO FIX A RATE FOR THE FUTURE. THEREFORE THE DECREE OF THE COURT BELOW, ANNULLING, ENJOINING AND SETTING ASIDE THE ORDER OF THE COMMISSION ATTEMPTING SO TO DO, WAS PROPER AND SHOULD BE AFFIRMED.

This court has in several cases decided the question of whether certain commerce was interstate or foreign on the one hand, or intrastate on the other hand, and the governing rule of law is well settled. In its opinion in *Baltimore and Ohio Southwestern R. R. Co. vs. Settle,* 260 U. S. 166, the court declared (p. 170):

> "Whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement."

In its opinion in *Atlantic Coast Line R. R. Co. vs. Standard Oil Co.,* 275 U. S. 257, 268, the court declared:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending

> to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of a movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars."

In the same opinion (pp. 268-269), the court stated:

> "* * * the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it."

These are the rules of law applied by the court below, and we submit that when the whole group of facts in respect to the commerce here involved is weighed, it will be found that the court below was correct in its finding that:

> "In the present case the essential character of the transaction is in intrastate and not interstate commerce" (R. 29).

The Hammersley Manufacturing Company offers to purchase from the New York dealer foreign wood pulp of a certain grade or quality at a certain price delivered to it on the steamship's dock in New York Harbor, which in this case is Hoboken, N. J. When so doing, it does not know who the foreign producer is to be. Nor does it always know where the pulp is to be produced or even from what port it is going to be shipped. Others have made offers to the same dealer to purchase from him other wood pulp. The dealer combines all these offers in one cable to the foreign

producer naming each of the parties who have offered to buy from him. The foreign producer cables the New York dealer an acceptance of the latter's offer who then notifies the Hammersley Company (and the others) of his acceptance of their offer and executes written contracts covering the purchase and sale. The foreign producer loads all of the pulp sold to the New York dealer on the steamer at the foreign port in one lot, not marked for the Hammersley Manufacturing Company or for anyone else, but without any distinguishing marks, except marks to indicate the grade or quality. All of it, that which the Hammersley Company has offered to buy from the dealer as well as that others have offered to buy from him, is consigned to the dealer at New York on a single ship's bill of lading and all of it is invoiced to the New York dealer on one invoice. As soon as the ship clears the foreign port the New York dealer pays the foreign producer for it. It is to be noted that under his contract with the Hammersley Manufacturing Company, delivery is "Ex dock" New York Harbor and the payment by the latter to the former is 30 days or more after the date of the invoice or trade acceptance (R. 63, 66). On arrival of the wood pulp at Hoboken it is unloaded by the steamer onto the steamer's pier, *not a pier of appellees.* The New York dealer having been notified of its arrival notifies the Hammersley Company which gives him, *not appellees,* orders for shipment as it desires. The dealer does not ship it all out promptly, but some or all of it lays on the pier at Hoboken several days at a time. When, pursuant to his arrange-

ment with the Hammersley Company, the dealer is to ship some of the wood pulp to Garfield he prepares a railroad bill of lading for the movement from Hoboken to Garfield and a dock order (an order to the steamship company to deliver to appellees) and delivers both to the Hoboken Manufacturers' Railroad which thereupon presents the order, obtains physical possession of the wood pulp to be transported and executes the bill of lading which shows the New York dealer as the shipper and the Hammersley Manufacturing Company at Garfield as the consignee.

This whole group of facts, we respectfully submit, shows that the transportation for which the Commission has here sought to reduce the rate for the future and award reparation for the past is intrastate. The interstate or foreign commerce was terminated when the steamer unloaded the wood pulp onto its Hoboken pier. The contract between the foreign producer and the New York dealer, and that between the steamship company and the New York dealer, were completely performed.

Thereafter this dealer distributed by means of dock orders or otherwise so much of this grade or quality to this one of his purchasers and so much to that one and so much to the Hammersley Company as his contracts with them required.

As the court below rightly held on these facts, the essential character of the transaction is in intrastate commerce.

In *Atlantic Coast Line R. R. Co. vs. Standard Oil Company, supra,* the facts are stated as follows:

"The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transportation which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal."

It was held that the rail transportation within Florida from the Florida seaboard points to the Florida inland points was intrastate.

That case rules this one. There the seller, the foreign oil producer, sold and shipped direct to the Standard Oil Company which itself distributed the oil from the seaboard to the interior. Here, the seller, the foreign wood pulp producer, sold and shipped, not to

the Hammersley Company but to the New York dealer who distributed to the Hammersley Company and to others after the wood pulp had been unloaded on the docks. The rail shipment was a separate, independent and intrastate transaction.

Further, at page 269, the Court says:

> "Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."

Here everything that is done after the ship's load of wood pulp is unloaded by it onto its dock, is done in the distribution of the wood pulp to serve the purposes of the New York dealer who then owned it and who imported it.

Our case is stronger than was that of *Chicago, Milwaukee & St. Paul Rwy. vs. Iowa,* 233 U. S. 334. There shipments of coal had been made from points outside the state to Davenport, Iowa. The Davenport, Iowa, consignee desired to reconsign the shipments on arrival at Davenport in the same cars to points within Iowa, the transportation to which would cover a movement solely within Iowa. The Railroad Company refused to accept orders for such reconsignment and refused to transport the traffic. On complaint the Iowa Railroad Commission prohibited this practice and ordered that it be stopped. The Railroad Company refusing to obey that order, the state of Iowa sought a mandatory injunction requiring compliance.

The case came to the United States Supreme Court on the question of whether or not the commerce involved was interstate. If it were interstate, the Iowa Railroad Commission was without jurisdiction. The Court held that the State Commission did have jurisdiction, as the shipments were not interstate, Davenport being a distributing point for the coal shipped by the consignor. It was the view of the Court that the fact that commodities in interstate shipment were shipped by the consignee in the very same cars in which they had arrived, did not establish a continuity of movement, so that the reshipment within the State would not have an independent and intrastate character.

Also it is stronger than was that of *Gulf, Colorado and Santa Fe Rwy. Co. vs. Texas,* 204 U. S. 403, where the facts were that a grain dealer of Kansas City, having sold a car of corn for delivery in Goldthwaite, Tex., bought two cars of corn which were shipped from Hudson, S. Dak., consigned to him at Texarkana, Texas. Upon arrival of the two cars at Texarkana, he shipped one of them to Goldthwaite, in fulfillment of his contract. Although the shipment and transportation from Texarkana, Tex., to Goldthwaite, Tex., was in the same car and followed upon the interstate transportation from Hudson, S. Dak., to Texarkana, Tex., the Court held the intrastate rate applicable to the Texarkana-Goldthwaite movement, on the ground that it was an independent movement and not a continuation of the interstate movement.

Here the fact is that the New York dealer had shipped to him by steamer on one bill of lading many bales of wood pulp and upon arrival at Hoboken and unloading on the steamship pier there, he segregated and shipped under a new contract made with the appellees, some of that wood pulp to Hoboken, N. J., in fulfillment of his contract with the Hammersley Company.

The appellants rely upon two lines of decisions to support their contentions here. In one of them the question was as to whether the Interstate Commerce Act applied to the transactions there involved, and in the other the question was as to whether property moving in interstate commerce could be subjected to local taxation.

Each of these cases is so different in its facts from the facts in this case that none is apposite.

For example:

In *Railroad Commission of Ohio vs. Worthington*, 275 U. S. 101, the rail carriers had published a rate on coal from Ohio mines to Huron, Ohio, of 90 cents per ton when loaded on vessels for movement to other states or to Canada, and of $1.00 per ton when for commercial use at Huron. Upon complaint after hearing the Ohio Railroad Commission reduced the rate to 70 cents per ton on "Lake Cargo Coal" for transportation from the mines to the port (Huron), unloading from the cars and loading upon the vessel and then trimming the load. The facts were that the coal was necessarily shipped beyond the port to other states and to Canada and that it remained in the pos-

session of the rail line in the car until the rail carrier loaded it into the vessel. Clearly this was continuity of movement.

In *Railroad Commission of Louisiana vs. Texas and Pacific Rwy. Company*, 229 U. S. 336, the shipments moved on local bills of lading, but were delivered direct by the railroad company to the steamship company. They were, under the tariff, accorded 20 days' free time as distinguished from 4 days' free time accorded to domestic freight; they paid the handling charge, which, under the tariff, was applied to export shipments, but did not apply on domestic freight. It was held that the fact that the shipments moved under local bills of lading did not divest them of their export character; that there was a continuity of movement, and no interruption of the transportation to the foreign destination beyond what was necessary for transshipment at New Orleans.

In *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S. 498, the shipment was by rail to the port from Young to Young and by water to the foreign country from Young to Young's order. Young bought cottonseed cake and meal at points within and without the State of Texas and shipped it to himself at Galveston. There he had use of a wharf belonging to the Terminal Company, which was held to be a part of the line haul of the rail carriers, for the handling of his cottonseed cake and meal. His competitors were denied such use of this wharf. The court held that this was an undue preference in giving to Young the use of the wharf facilities and

denying it to others. There was no distinction between the cottonseed meal bought or *shipped from points outside of Texas,* and the cottonseed cake bought in Texas, shipped to Galveston, there manufactured into meal and then exported. It was found that the manufacture or concentration on the wharf, under those circumstances, in the transshipment of the articles in export trade, were but incidents in the transportation. In other words, the Terminal Company being a part of the line-haul carrier, and some of the traffic having moved from points outside of Texas for transshipment across the wharf at Galveston, clearly the provisions of the Interstate Commerce Act were applicable.

In *Texas and New Orleans Railroad Company vs. Sabine Transit Company,* 227 U. S. 111, a lumber dealer at Sabine sold lumber for delivery in Europe. It was shipped to him by rail from points within Texas on way bills marked by the railroad "for export." On arrival at Sabine it was unloaded onto the railroad docks or into its slips in reach of ship's tackle, ready for loading on the ship. The tariff provided a switching charge, which was assessed on domestic shipments but was absorbed out of the rate on foreign shipments. This charge was not assessed, but was absorbed. The tariffs provided for a storage charge to be assessed on domestic freight if not removed from the railroad's premises when unloaded. No such charge was assessed. There was no local trade or consumption at Sabine. In the case at bar there was a local trade on the docks (R. 41).

Of the second line of decisions referred to *supra*, *Carson Petroleum Co. vs. Vial*, 279 U. S. 395, is typical. There a state tax was assessed on a quantity of oil in storage tanks at St. Rose, Louisiana. The taxation was contested on the ground that it was an interference with interstate and foreign commerce. The court said (p. 101):

> "The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit."

The oil was purchased in states other than Louisiana and received interstate rail movement up to St. Rose at an export rate lower than the domestic rate. The above quotation from the opinion shows there was no doubt but that the oil was moving in interstate commerce, and that the only question was whether holding it at St. Rose awaiting the arrival of a ship or the accumulation of a sufficient quantity to load a ship was such a break in the continuity of interstate transportation as to render it subject to the local tax laws. The court held it was not.

This and the other cases of the same nature afford no judicial support for the appellants' contentions here.

The decree of the lower court should be affirmed.

HERBERT A. TAYLOR,
MARION B. PIERCE,
For Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1929.

United States et al., Appellants, *vs.* Erie Railroad Company et al.	Appeal from the District Court of the United States for the District of New Jersey.

[November 25, 1929.]

Mr. Justice Brandeis delivered the opinion of the Court.

Upon complaint of Hamersley Manufacturing Company, the Interstate Commerce Commission issued an order that the Erie Railroad Company and a connecting carrier establish an all-rail rate of 10 cents per 100 pounds on wood pulp imported through the port of Hoboken, New Jersey, and shipped from there to Garfield, New Jersey, in carloads. *Hamersley Mfg. Co.* v. *Erie R. R. Co.*, 126 I. C. C. 491; 148 I. C. C. 47. The carriers brought this suit in the federal court for that State to enjoin enforcement of the order and to set it aside. The District Court granted the relief. *Erie R. Co.* v. *United States*, 32 F. (2d) 613. The case is here on direct appeal under Act of October 22, 1913, c. 32, 38 Stat. 208, 220, Act of February 13, 1925, c. 229, 43 Stat. 936, 938, amending § 238 of the Judicial Code. The sole ground for the carriers' attack on the order, and also the sole ground for the decree below, is that the shipments are wholly intrastate and, therefore, the Commission lacked jurisdiction over the rates.

The Commission found the following facts concerning the course of the business involved. The Hamersley Company makes to a New York broker, who is a commission agent for specified foreign mills, its offer to buy a certain quantity and grade of pulp manufactured abroad. The broker cables the offer to one of the foreign mills which he represents, naming the prospective purchaser. If the offer is accepted, the broker so informs the Company and then makes a contract with it in his own name, sending a copy to the mill. The contract provides for shipment from abroad during a

specified period and delivery, at the agreed price, on dock New York Harbor. The mill is not named in the contract. It ships to the broker the ordered quantities marked with a brand, but not so as to show the individual customer, and cables the broker when the shipment is made, naming the steamer, the quantity, the customers, and the date of expected arrival. This information is communicated by the broker to the Company. It appears from the record that the broker pays the mill as soon as he is thus advised of the shipment; and that the ship's bill of lading is sent to him.

The pulp destined for the Company may be part of a larger shipment. But the number of bales allotted to it are always delivered at Garfield; none may be diverted to any other customer; and no pulp is shipped to the broker for sale to purchasers to be obtained while the pulp is in transit or after its arrival. Upon arrival of the pulp in Hoboken, the broker gives to a terminal company the dock orders, specifying delivery of the required number of bales, and makes out the bills of lading for shipment from there to Garfield. These papers name the ship by which the pulp arrived at the Hoboken dock. There may be some delay in forwarding the wood pulp by rail after delivery on the dock because, under an arrangement between the broker and the Company, the pulp is shipped from the dock in lots of two or three cars in order to prevent congestion at Garfield. The freight from the dock to Garfield is paid by the Company to the rail carrier. The Commission found "that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield."

The carriers contend that title to the pulp does not pass to the Company until the broker arranges, at the Hoboken dock, for shipment of the specific lot to Garfield; that the shipment by the mill to its agent, as consignee, of pulp in quantity exceeding that ultimately destined to Garfield, terminates when the pulp is delivered on dock at Hoboken; that this foreign shipment is distinct from the subsequent shipment by the broker to Garfield of the smaller quantity, under a new and local bill of lading; and that therefore, the rail movement from Hoboken to Garfield is an independent intrastate transaction. But the nature of the shipment is not dependent upon the question when or to whom the title

passes, *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 465-6. It is determined by the essential character of the commerce. *Baltimore & Ohio S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, 170. It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate, *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101, 108-110; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469; or by the fact that there may be a detention before or after the shipment on the local bill of lading, *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95. The findings of the Commission, that the broker acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield, ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain it. *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658. The rail transportation is in fact a part of foreign commerce.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.